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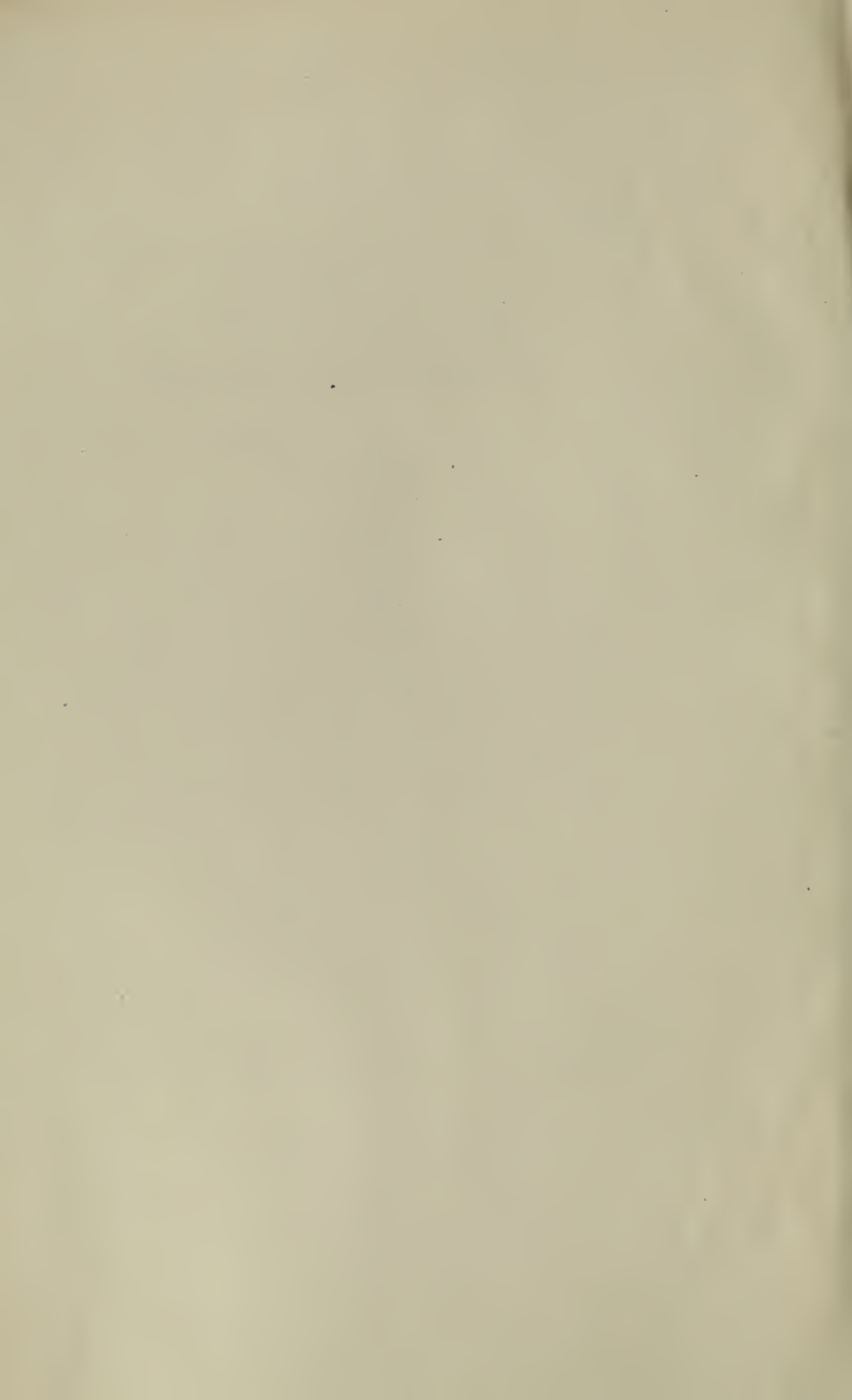
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26
No. 2509

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Plaintiff in Error,

vs.

GRACE MUSTELL, as Administratrix of the Estate
of FRED G. MUSTELL, deceased, and as the per-
sonal representative of said FRED G. MUSTELL,
deceased, for and on behalf of GRACE MUSTELL
and RUTH MUSTELL, the widow and minor child,
respectively, of said FRED G. MUSTELL, deceased,

Defendant in Error.

Transcript of Record

**Upon Writ of Error to the United States District Court
for the Eastern District of Washington,
Northern Division.**

Filed

OCT 31 1914

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NAMES AND ADDRESSES OF ATTORNEY'S
OF RECORD.

CHARLES S. ALBERT and THOMAS BALMER,
Great Northern Passenger Station, Spokane, Wash-
ington,

Attorneys for Plaintiff in Error.

PLUMMER & LAVIN, Old National Bank Building,
Spokane, Washington,

Attorneys for Defendant in Error.

IN THE DISTRICT COURT OF THE UNITED
STATES, FOR THE EASTERN DISTRICT
OF WASHINGTON, NORTHERN
DIVISION.

GRACE MUSTELL as Administra-
trix of the estate of FRED G.
MUSTELL, deceased, and as the
personal representative of said
FRED G. MUSTELL, deceased,
for and on behalf of Grace Mus-
tell and Ruth Mustell, the widow
and minor child respectively, of
said Fred G. Mustell, deceased,

Plaintiff,

vs.

THE GREAT NORTHERN RAIL-
WAY COMPANY, a corporation,

Defendant.

Amended Complaint.

Comes now the above named plaintiff and for am-
ended complaint, and for the purpose of carrying
out the order of the court in making paragraphs seven
and sixteen of plaintiff's original complaint more de-
finite and certain, files and serves this her amended
complaint and alleges:—

I.

That the Great Northern Railway Company, the above named defendant, is and was, at all times herein mentioned, a railroad corporation created, organized and existing under and by virtue of the laws of the State of Minnesota, and owning, operating and controlling a line of transcontinental railroad within and through the States of Minnesota, North Dakota, Montana, Idaho and Washington, for the transportation of freight and passengers, and owning, operating and controlling trains of cars running on said railroad line through and between said states, and engaged in carrying on the business of interstate commerce by railroad as a common carrier.

II.

That on to-wit: the 29th day of September, 1913, Fred G. Mustell died by reason of the injuries received at the town of Hillyard in the Division yards of said defendant.

III.

That Grace Mustell, during the life of said Fred G. Mustell, was his wife, and is now his surviving widow, and said Ruth Mustell is the surviving minor child of said Fred G. Mustell, and said Grace Mustell is administratrix of the estate, and the personal representative of said Fred G. Mustell, deceased, and bring this suit as said administratrix and personal representative, and on behalf of herself as the surviving widow and on behalf of Ruth Mustell, the minor child of said Fred G. Mustell, deceased, under and by virtue of the

provisions of that certain act of Congress of the United States known as the "Federal Employers' Liability Act."

IV.

That at the time of the death of said Fred G. Mustell, and at the time he received the injuries which caused his death, he was in the employ and working for the above named defendant as a car checker in the division yards at Hillyard, Washington, and was, at the time of receiving the injuries hereinafter mentioned, in the performance of his duty and doing and performing acts and things necessary to be done and carried out for and on behalf of said defendant in carrying on and performing its business of interstate commerce by railroad as a common carrier, and his employment and the duties he was performing were an integral part of said business of interstate commerce by railroad, and by reason of the duties which were being performed by said Fred G. Mustell at the time of his injuries he was, at said time, employed by said defendant in interstate commerce by railroad.

V.

That Hillyard, Washington, is a division point on the line of said railroad where trains of cars coming from the west and from eastern states are broken up and trains of cars switched in such a manner as to make up trains for a continuation of the journeys of said trains, both interstate and intrastate, and for such purpose said defendant had, and has at all times employed continuously certain switching engines and engine crews engaged in switching and making up

said trains in and upon the several railroad tracks in said division yards.

VI.

That at the time of the happening of the injuries to said deceased said defendant had within its yards at said Hillyard numerous trains of cars, switching engines and other railroad equipment, and it was the duty of said deceased as a car checker, in which duty he was engaged at the time of his death, to go through, upon, over and across the numerous and several tracks in said yards for the purpose of securing data and records of the several cars coming in over said divisions, both from the east and west, and to make a record of the car seals, car numbers and the origin and destination of the cars brought in by the several trains of defendant, which data, records and facts were written down by said deceased, and said information conveyed by him to the office of defendant in said yards for the purpose of keeping a record thereof and to enable said defendant to handle and use said cars according to, and consistent with the information and record taken down and made by said deceased.

VII.

That at the time deceased received his injuries which caused his death he had been out, through and upon said yards and tracks making a record of said cars upon one of said tracks in said yards, as aforesaid, and obtaining and recording the information therein, thereon and thereabout received, and was carrying said record and information to the office of the company for

the purpose aforesaid, and while passing over and upon track known as track No. 1 in said yards, a line of about fifteen freight cars that was standing still at the time said Fred G. Mustell started across said track No. 1 were, by the negligent and careless acts on the part of the switching crew as aforesaid and as hereinafter alleged, in the employ of defendant, suddenly and violently moved forward and upon said Fred G. Mustell, knocking him down, running over him, causing injuries which resulted in his death on the same day.

VIII.

That said string of fifteen standing cars aforesaid was coupled in to by another string of cars moving easterly on said track No. 1 to which was attached a locomotive switching engine in charge of the switching crew of said defendant, and said fifteen standing cars, after being coupled up with said other cars, was moved forward a distance of from two to four car lengths before they were stopped.

IX.

That according to the custom and usage of switching crews handling and switching cars in the Hillyard yards at the time of the death of Fred G. Mustell, and for more than twelve years prior thereto, it was the duty of said switching crew not to cause said string of fifteen standing freight cars, which struck and injured said Mustell, to be moved forward for any purpose unless a man was placed and standing upon the front end of said string, to-wit: the end which struck said Mustell, for the purpose of protecting said end of said

string of cars from coming in contact or in collision with anything or any person, and to protect persons who might be in and about said tracks in the performance of their duties, or at all. That said Fred G. Mustell knew of said custom, usage and duty, and relied thereon and believed that said string of cars would not move unless said man was placed on the end of said string of cars according to said custom; that said defendant negligently and carelessly moved said cars forward violently and suddenly, wholly in violation of said custom and usage, and wholly failing and neglecting to cause to be placed upon the end of said car or string of cars as aforesaid, and for the purpose aforesaid, said man. That said string of cars by reason of the negligence and carelessness of the said switching crew in handling their switching operations at said time and place, moved so violently, quickly, unexpectedly and without warning so that the said Fred G. Mustell was unable, in the exercise of reasonable care on his part, to escape from being run down and injured by said cars.

X.

That in handling switching operations in said yards it is usual and customary that said engine and cars be moved with reasonable care and without unnecessary violence, bumping and colliding, and that the movement of said string of cars that struck said Fred G. Mustell was wholly unnecessary, could not have been anticipated by deceased, Fred G. Mustell, and the violence and the manner in which they were moved was of an extraordinary character, and not the usual manner

in which cars are moved in order to accomplish the results desired by said switching crew.

XI.

That the employes of said defendant in performing said switching operations and in handling said strings of cars which caused the injury and death to said deceased were at said time in the employ of defendant and doing and performing an integral part of the acts and things necessary to be done for and on behalf of defendant in carrying on its business of interstate commerce by railroad as a common carrier, and said employes were at said time employed in said commerce.

XII.

That just prior to the injury received by said Fred G. Mustell as aforesaid, he was engaged and employed by defendant in obtaining the name, number and car seals of certain cars in the yards at Hillyard, Washington, for the purpose aforesaid, and at the time of his injury was engaged in returning to the depot of the company in said yards at Hillyard for the purpose of delivering the record of said cars made by him containing said information to the company.

XIII.

That the name, numbers, origin and destination of each of the cars which were checked by said Mustell, and from which he obtained the information and data which he was conveying to the depot at the time of his injury is as follows:

XIV.

Name of Car	Number	Freight contained therein	Destination
G. N.	220576	Coal	Vancouver, B. C.
"	126129	Coal	Vancouver, B. C.
"	110593	Cement	Vancouver, B. C.
"	25604	Concentrates	Tacoma, Wash.
"	210653	Coal	Vancouver, B. C.
"	208616	Coal	Vancouver, B. C.
"	103292	Coal	Vancouver, B. C.
"	74359	Coal	Vancouver, B. C.
"	100348	Concentrates	Tacoma, Wash.
"	126196	Coal	Vancouver, B. C.
"	105628	Concentrates	Tacoma, Wash.
"	111160	Cement	Vancouver, B. C.
"	24876	Wood	Spokane, Wash.
"	22495	Wood	Spokane, Wash.
"	112023	Wood	Spokane, Wash.
"	27270	Lumber	Spokane, Wash.
"	72007	Clay	Spokane, Wash.

That prior to and at the time of the moving of said string of cars which struck and injured said Mustell there was no man stationed upon top of said cars at any place whatsoever.

XV.

That the information and data obtained by said Fred G. Mustell just prior to his injury, and which he was conveying to the depot of the company was obtained by him for the use of the company so that said company could properly switch and make up its trains and cars and be guided to some extent in making up and switching said cars and trains by the

information received and obtained by said Mustell in the performance of his duties as car checker.

XVI.

That defendant in carrying on its switching operations in and about its yards at Hillyard, and in handling cars and making up trains defendant failed and neglected to provide, prepare, promulgate or enforce any sufficient rule or rules, regulation or regulations, or in fact, any regulations or rules at all in said switching operations and the handling of cars and engines in said yards for the purpose of warning other employes, and particularly said Fred G. Mustell, of any threatened danger of which he might not be in a position to be advised at the time, and the rules, if the same had been promulgated and enforced, would have eliminated a large part of the dangers incident to the duties of said Fred G. Mustell which he was performing at the time of his injury. That the company failed and neglected to provide, promulgate or enforce any rules in and about said switching operations, knowing, and by the exercise of reasonable care ought to have known, that unless some rule or regulation was promulgated and enforced with reference to said switching operations great danger would exist to the other employes who were required to go in and about the cars, tracks and switches while said switching operations were going on. That if reasonable rules had been promulgated and enforced so as to have advised said Fred G. Mustell of the danger threatening him immediately prior to his injuries and said rules and regulations had been enforced with reference

to said switching operations to the end that all persons whose duties called them in and about said cars and tracks would have warnings of threatened dangers, then said Fred G. Mustell would not have been injured and would not have been killed, and the failure to promulgate and enforce said rules or some reasonable rules was one of the contributing causes of the injury and death of said Fred G. Mustell.

That in said yards at Hillyard and the particular part thereof and adjacent thereto was situated the company's machine shops, round house, depot and other buildings in and about which large numbers of men are constantly employed and working, and all of said men are required at different times of the day to be in and about, over and across the tracks of said company in the performance of their duties during the time that switching operations are being conducted and carried on. That plaintiff's intestate and other employes were required in and about the performance of their duties to go over and across said tracks and in between strings of cars and trains of cars in the performance of their duties during switching operations, and often it would be impossible to see or determine just what cars were liable to be moved and thereby injure those working in and about or using said yards in the performance of their duties, and in order to avoid injuring, or the possibility of injuring said employes, including plaintiff's intestate, it was necessary that rules be promulgated and enforced which would make it the absolute duty of switching crews and those operating switching engines to give some warning

that said cars were being moved by said switching engines, or about to be moved, either by blowing the locomotive whistle or by ringing the locomotive bell, or by placing a man on the far end of the cars to be moved or bunted into other cars so as to warn those who might be passing over said track close to, or in the vicinity of said cars about to be moved, to the end that plaintiff's intestate and others using said tracks, as aforesaid, would not be placed in a dangerous position without being able to know, understand or appreciate the dangers incident to the promiscuous moving of cars suddenly and violently, and if rules were not promulgated and enforced requiring the engine bell to be rung when said cars were about to be moved or the whistle blown giving a signal in some manner which would be understood by those using said tracks in the performance of their duties, as aforesaid, and if a man was not placed at the head end of said cars to notify persons passing over said tracks of their intention to move said cars or said man placed in some position so as to give said warning then the company should have adopted some other efficacious rule or plan so that said employes working in and about said cars in passing and re-passing between and past the same should not be placed in a position of danger without their knowledge or warning being given them. That if said rules had been promulgated and enforced instead of the company relying upon a custom among railroad men in the yards at Hillyard to give the warning hereinbefore pleaded, and violation of the rules would have meant a discharge or suspension of the employe violating the same, it would have been a

greater influence and tended to eliminate the dangers incident to the work of plaintiff's intestate and other employes, but in truth and in fact the said company promulgated no rules whatsoever, relied upon the haphazard custom, depending largely upon the whim or caprice of the particular switching crew who might be handling cars, whereas, if a positive rule of the company was promulgated and enforced and the failure to enforce was followed by discharge or suspension, then said rule would be invariably obeyed, and whereas the violation of the custom is often and usually disregarded and followed by no penalty for so doing.

XVII.

That by reason of said car running over and upon said Fred G. Mustell he was greatly cut, mangled, maimed and seriously injured, which caused extreme and excruciating pain and suffering during the time that he lived, to his damage in the sum of Ten Thousand Dollars, (\$10,000.00), and for which he had a cause of action against defendant by reason of the allegations, matters and things herein pleaded, and by reason of said cause of action surviving the said Grace Mustell demands and claims said sum of Ten Thousand Dollars, (\$10,000.00), as and for the injuries, pain and suffering sustained by said Fred G. Mustell during his life time, in addition to the other damages hereinafter pleaded on behalf of the beneficiaries hereinafter mentioned.

XVIII.

That by reason of the injuries received by said Fred G. Mustell he thereafter died, and by reason of

his death and the facts hereinbefore pleaded, and by reason of the negligence and carelessness on the part of said defendant, its agents and servants, said Grace Mustell, as the widow of said Fred G. Mustell, and his beneficiary, and on account of his death, has been and is damaged in the sum of Thirty-five thousand Dollars, (\$35,000.00), and the said Ruth Mustell, the surviving minor child of said deceased, Fred G. Mustell, has been and is damaged in the sum of Fifteen Thousand Dollars, (\$15,000.00), making a total amount to which plaintiffs have been damaged as herein pleaded, in the sum of Sixty Thousand Dollars, (\$60,000.00).

WHEREFORE, plaintiff demands judgment against the above named defendant for the sum of Sixty Thousand Dollars, (\$60,000.00), and costs and disbursements.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
COUNTY OF SPOKANE.—ss.

Grace Mustell being first duly sworn deposes and says: That she is the plaintiff in the above entitled action; that she has read the foregoing complaint, knows the contents thereof, and that the same is true, as she verily believes.

(Signed) GRACE MUSTELL.

Subscribed and sworn to before me this 30th day of July, 1914.

(Seal) (Signed) GERTRUDE KENDRICK,
Notary Public in and for the State of Washington,
residing at Spokane.

Endorsement: Service admitted this 18th day of August, 1914.

(Signed) CHARLES S. ALBERT,
Attorney for Defendant.

Amended Complaint, filed September 1st, 1914.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Answer to Amended Complaint.

Now comes the above named defendant and for its answer to the amended complaint of the plaintiff herein, and

I.

AS A FIRST DEFENSE THERETO:

1. Admits that it is now, and during all the times mentioned in the amended complaint has been, a railway corporation, created, organized and existing under and by virtue of the laws of the State of Minnesota, and that it does now, and during all of said times has owned, operated and controlled a line of railway from the City of St. Paul in the State of Minnesota, to and through the States of North Dakota, South Dakota, Montana, Idaho and Washington, for the transportation of freight and passengers, and is and has been during a part of the time and at some places engaged in interstate commerce and part of the time and at some place in intrastate commerce.

2. Said defendant admits that on the 29th day of

September, 1913, Fred G. Mustell died from the result of injuries received at Hillyard, Washington.

3. Said defendant admits that the said Grace Mustell is the surviving widow and said Ruth Mustell is the minor child of said Fred G. Mustell, and that said Grace Mustell is the administratrix of said estate.

4. Said defendant admits that at the time of the injuries to and death of said Fred G. Mustell, part of the employment of said Fred G. Mustell was a car checker in its yards at Hillyard, and said defendant admits that Hillyard, Washington is a division point on the line of said defendant's railway, and that trains are made up and broken up in said yards, and cars are switched in said yards; that some of said cars come from foreign states and some go to foreign states and that others do not, and said defendant admits that it has at all times employed continuously switching engines and crews engaged in the switching and making up of trains in and upon the several railroad tracks in its said yards.

5. Said defendant admits that at the time of the happening of the injuries to said Fred G. Mustell, said defendant had within its yards at Hillyard numerous trains of cars, switching engines and other railroad equipment.

6. Said defendant admits that it was part of the duties of said Fred G. Mustell to pass over and across the tracks in said yards, for the purpose of checking the cars in said yards, and that said checking was made for the purpose of furnishing the defendant with in-

formation. Said defendant admits that immediately previous to the death of the said Fred G. Mustell, he had been among other things checking cars in said yards, and that while upon Track No. 1 in said yards he came in collision with a freight car upon said track.

8. Said defendant further admits that said car which collided with the said Fred G. Mustell was coupled onto a string of cars and that said string of cars moved a distance not to exceed four car lengths before said car stopped.

9. Said defendant specifically denies each and every allegation of Paragraph IX of said complaint.

10. Said defendant specifically denies the allegations of Paragraph X of said amended complaint.

11. Said defendant admits that at the time of the injuries to and death of said Fred G. Mustell, said defendant's employes were engaged in switching cars in said yards.

12. Said defendant admits that immediately prior to the injuries to and death of said Fred G. Mustell, part of the work which he was engaged in was that of a car checker; that he was going from one of the tracks in the yards of said defendant over and across another of said tracks in said yard.

13. Said defendant admits that the name of the cars, numbers and freight contained therein and destination thereof which said Fred G. Mustell had checked immediately previous to his injuries and death are as set forth in Paragraph XIII of said amended complaint.

14. Said defendant admits the allegations of Paragraph XIV of said amended complaint.

15. Said defendant admits that prior to his death said Fred C. Mustell was conveying to the defendant's depot certain information and data contained upon his checking list; that said information was obtained by him for the use of defendant so that said defendant could switch and make up its trains and cars, and be guided to some extent in making up and switching said cars and trains by such information.

16. Answering Paragraph XVI of said amended complaint, said defendant admits that in and about the yards at Hillyard are located certain shops of the said defendant. and that a number of men were employed in and about the same, and that some of said employes were required to go over and across the tracks of the said defendant. Further answering said Paragraph XVI of said amended complaint, said defendant specifically denies each and every allegation thereof.

17. Said defendant alleges that the injuries received by the said Fred G. Mustell resulted almost immediately in his death. Said defendant specifically denies that the said Fred G. Mustell had any cause of action against the said defendant, either in the sum of ten thousand dollars or in any sum whatever.

18. Said defendant specifically denies that the said Grace Mustell has been damaged by reason of any acts or negligence on the part of the defendant, either in the sum of thirty-five thousand dollars or in any sum whatever, or that the said Ruth Mustell has been damaged by reason of any acts or negligence on the

part of said defendant, either in the sum of fifteen thousand dollars, or in any sum whatever, or that plaintiffs have been damaged by reason of any acts or negligence on the part of said defendant, either in the sum of sixty thousand dollars or in any sum whatever.

19. Said defendant denies each and every allegation, matter and thing in said amended complaint contained, except as has been hereinbefore specially admitted.

Further answering said amended complaint and

II:

FOR A SECOND DEFENSE THERETO:

1. Re-affirms and re-alleges all those matters and things as set forth and contained in Paragraphs 1 to 19, inclusive, of said defendant's first defense hereto.

2. Denies each and every allegation, matter and thing in said amended complaint contained, except as is hereinafter specifically admitted.

3. Said defendant alleges that the injuries to and death of the said Fred G. Mustell were not caused by any acts or negligence on the part of said defendant, but alleges that the same were caused by his own carelessness and negligence, and that such carelessness and negligence were an efficient cause of his death, and contributed to cause the same.

III.

Said defendant further answering said amended complaint, and for a third defense thereto:

1. Re-alleges and re-affirms all these matters and

things as set forth and contained in Paragraph 1 to 19, inclusive, of said defendant's first defense hereto.

2. Denies each and every allegation, matter and thing in said amended complaint contained, except as is hereinafter specifically admitted.

3. Said defendant alleges that the said Fred G. Mustell at and previous to the time he met his death, as aforesaid, knew the dangers of his employment, of the uses of the ways, works, means, appliances, instrumentalities and servants which were being used at the time and place he met his death, in the condition and in the manner in which the same were being used and operated at said time and place, and that he appreciated the dangers thereof, and assumed the risks thereof.

WHEREFORE, said defendant demands judgment that plaintiff take nothing by her complaint, and that it be hence dismissed with its costs and disbursements herein.

(Signed) CHARLES S. ALBERT,

(Signed) THOMAS BALMER,

Attorneys for Defendant.

P. O. Address:

Great Northern Passenger Station,

Spokane, Washington.

STATE OF WASHINGTON,
COUNTY OF SPOKANE.—ss.

Charles S. Albert, being duly sworn, on oath says: that he is one of the attorneys for the defendant, Great Northern Railway Company, in the above-entitled cause; that he has read the foregoing answer to amended complaint, knows the contents thereof; and he believes the same to be true.

That defendant is a foreign corporation, is not within said county, is incapable of making the affidavit of verification herein, is absent from said county, and has no officer within the same authorized to make the verification, other than its attorneys, one of whom is affiant, who is duly authorized so to do and that the reason for this affiant making this verification is hereinbefore immediately set forth.

(Signed) CHARLES S. ALBERT.

Subscribed and sworn to before me this 31st day of August, 1914.

(Signed) HERBERT H. SIELER,
Notary Public in and for the State of Washington,
residing at Spokane, Wash.

(Notarial Seal)

Endorsements: Answer to Amended Complaint.

Filed in the U. S. District Court for the Eastern District of Washington, September 1, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

Title of Court and Cause).

Reply.

Plaintiff for reply to the affirmative matter contained in defendant's answer says:

I.

Denies that the injuries received by the said Fred G. Mustell resulted immediately in his death, but alleges that said deceased lived several hours after the infliction of said injuries as alleged in paragraph 17 of defendant's answer.

II.

Denies each and every allegation, matter and thing contained in paragraph three of subdivision two designated defendant's "second defense to plaintiff's complaint.

III.

Denies each and every allegation, matter and thing contained in subdivision three of paragraph three of defendant's answer.

WHEREFORE, having fully answered plaintiff prays as in her original complaint.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
COUNTY OF SPOKANE.—ss.

Grace Mustell being first duly sworn deposes and says; that she is the plaintiff in the above entitled action; that she has read the foregoing reply, knows the contents thereof, and that the same is true, as she verily believes.

(Signed) GRACE MUSTELL.

Subscribed and sworn to before me this 1st day of September, 1914.

(Seal) (Signed) GERTRUDE KENDRICK,
Notary Public in and for the State of Washington,
residing at Spokane.

Endorsements: Service admitted this 1st day of September, 1914.

Attorney for Defendant.

Reply.

Filed in the U. S. District Court for the Eastern District of Washington, September 1st, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

General Verdict.

We, the jury in the above-entitled cause, find for the plaintiffs in the sum of \$5,750, and apportion the amount of the recovery as follows: to the widow, Grace Mustell, the sum of \$3450.00; to the infant child, Ruth Mustell, the sum of \$2300.00.

(Signed) F. P. FRENCH,
Foreman.

Endorsements: General Verdict.

Filed in the U. S. District Court for the Eastern District of Washington, September 22, 1914.

W. H. HARE, Clerk.

(Title of Court and Cause).

Special Findings.

(1) Was the train movement which causes the death of Fred G. Mustell a "running switch" within the intent and meaning of the rules of the defendant company?

Answer: No.

(2) Was it the custom of the defendant to place a man on the head car when moved in the manner the car in question did move, and did Mustell rely on this custom?

Answer: No.

(3) Were the cars which struck Mustell moved in a manner extraordinary or unusual?

Answer: Yes.

(4) Was the defendant negligent in failing to provide a rule for the warning of employes such as Mustell?

Answer: No.

(5) Did Mustell assume the risk?

Answer: No unusual risk.

(6) Was the negligence of Mustell the sole cause of his death?

Answer: No.

(Signed) F. P. FRENCH,
Foreman.

Endorsements: Special Findings of Jury.

Filed in the U. S. District Court for the Eastern District of Washington, September 22, 1914.

W. H. HARE, Clerk.

(Title of Court and Cause).

Motion For New Trial.

Comes now the above named plaintiff and moves the Court to set aside the verdict of the jury and grant a new trial of the above entitled cause on the following grounds, to-wit:

I.

Inadequate damages appearing to have been given under the influence of passion or prejudice.

II.

Error in the assessment of the amount of recovery.

III.

Insufficiency of the evidence to justify the verdict and that the same is against law.

IV.

Misconduct of the jury.

V.

Error in law occurring at the trial.

VI.

Specifying with more particularity plaintiff alleges: That the damages awarded by the jury are wholly and totally inadequate; that if plaintiff was entitled to recover under the evidence, then the amount of damages awarded is wholly inadequate and there is no evidence in the case or at the trial which justifies the small amount of said verdict; that according to the undisputed evidence, if plaintiff is entitled to recover she is entitled to a much greater sum, and if, under the evidence, she is not entitled to recover, then the jury should not have awarded any damages whatsoever.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

Endorsements: Service admitted this 22nd day of September, 1914.

(Signed) CHARLES S. ALBERT,
Attorney for Defendant.

Motion for New Trial.

Filed in the U. S. District Court for the Eastern District of Washington, September 23, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Motion For Judgment Notwithstanding the Verdict.

Now comes the defendant above named, and moves this Court for an order, vacating and setting aside the verdict rendered in said action on the 22nd day of September, 1914, in favor of the plaintiff, and for judgment in favor of the defendant notwithstanding such verdict, upon the following grounds:

1. That neither the evidence nor the testimony shows or tends to show, either directly or indirectly, that the defendant or anyone for whom it was responsible, was guilty of any negligence, but on the contrary conclusively shows that the defendant exercised all the duties imposed upon it by law, and that said defendant used the care required to furnish the plaintiff's intestate a reasonably safe place in which to work.

2. That no cause of action against the defendant, in favor of the plaintiff has been proven.

3. That no cause of action against the defendant has been proven under the Act of Congress relating to the liability of common carriers by railroad to their employes in certain cases, approved April 22nd, 1908, as amended April 5, 1910, known as the Federal Employer's Liability Act.

4. That the evidence and testimony adduced on the part of the plaintiff and also that adduced on the whole case, shows, as a matter of law, that the plaintiff's intestate assumed the risks and dangers to which he was exposed, if any, and that it was part of the consideration of his employment and part of his duty under such employment to assume such risks and dangers, if any

there were, which directly or indirectly brought about the accident sued upon.

5. That the evidence and testimony shows that the said plaintiff's intestate knew of the danger which caused his injuries, which evidence and testimony conclusively shows, as a matter of law, that plaintiff is not entitled to a verdict herein, but that the said defendant is and was entitled to a verdict, and is entitled to judgment against the plaintiff.

6. That the evidence does not show that the defendant negligently or carelessly moved the car which came in collision with plaintiff's intestate violently, or with unnecessary violence, or that said movement was unnecessary, or that the violence or manner in which the same was moved was of an extraordinary character or was an unusual manner, or that the collision between said car and said Mustell was caused by reason of negligence or carelessness on the part of the switching crew in handling the switching operations at the time and place when said collision occurred, or that said car was moved without reasonable care by the said defendant.

7. That the jury having found specially with reference to the other particulars alleged in said complaint of negligence on the part of said defendant, and there being no evidence in support of the charge of negligence referred to in the last ground of this motion, no cause of action against the said defendant has been proven or shown herein.

8. That the evidence is insufficient to sustain a verdict for the plaintiff, upon the ground that the evidence and findings of the jury show that upon all other grounds alleged in the complaint, except upon the

ground mentioned in Paragraph 6, that the defendant was not negligent and that with reference to such ground the evidence conclusively shows not only that the said car was not moved in a careless, negligent, unusual or extraordinary manner, but does show that said car was moved in the ordinary and usual manner of moving such cars.

This defendant in making this motion for judgment notwithstanding the verdict expressly waives any and all right to a new trial or another trial in this action and makes no motion therefor, and requests that no new trial of said action be granted, but, on the contrary, said defendant makes this motion to vacate and set aside the verdict in favor of the plaintiff and for judgment in favor of the defendant notwithstanding such verdict.

Said motion is based upon the findings and papers on file, upon the minutes of the Court, including not only the clerk's minutes and any notes and memorandum which may have been kept by the judge of this Court in the trial thereof, but also the reporter's transcript of his shorthand notes of said trial.

Dated at Spokane this 29 day of September, 1914.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant.

Endorsements: Due service of the within motion by a true copy thereof, is hereby admitted at Spokane, Washington, this 29th day of September, 1914.

(Signed) PLUMMER & LAVIN ,
Attorneys for Plaintiff.

I certify that the filing of the within motion is allowed this 30th day of September, 1914.

(Signed) FRANK H. RUDKIN,
Judge.

Motion for Judgment Notwithstanding the Verdict.
Filed in the U. S. District Court for the Eastern District of Washington, September 29, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Order Denying Motion for New Trial.

This cause coming on to be heard upon plaintiff's motion for a new trial of the above entitled cause, the above named plaintiff appearing by Plummer & Lavin, her attorneys, urging said motion, and the above named defendant appearing by Chas S. Albert and Thomas Balmer, its attorneys of record, resisting said motion, and after hearing said motion and the argument of counsel for the respective parties, and the Court being fully advised in the premises, it is hereby

ORDERED: that said motion for a new trial be, and the same is hereby denied, to which plaintiff excepts and exception is allowed.

Done in open Court this 2nd day of October, 1914.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements. Order Denying Motion for New Trial.

Filed in the U. S. District Court for the Eastern District of Washington, October 2, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Order Denying Motion for Judgment Notwithstanding Verdict of Jury.

This cause coming on to be heard upon defendant's motion for judgment notwithstanding the verdict of the jury, the above named defendant appearing by Chas. S. Albert and Thomas Balmer, its attorneys of record, urging said motion, and the above named plaintiff appearing by Plummer & Lavin, her attorneys, resisting said motion, and after hearing said motion but no argument thereon and the Court being fully advised in the premises, it is

ORDERED: that said motion be, and the same is hereby denied, to which ruling defendant excepts and its exception is allowed.

Done in open Court this 2nd day of October, 1914.

(Signed) FRANK H. RUDKIN,
Judge.

O. K. as interlined to form only.

(Signed) CHARLES S. ALBERT,
Attorney for Defendant.

Endorsements: Order Denying Motion for Judgment Notwithstanding Verdict.

Filed October 2, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Judgment.

This cause heretofore coming on to be heard in open Court before the Court and a jury, and after the parties had concluded their testimony the Court instructed the

jury, and the jury retired to deliberate upon their verdict, and thereafter said jury appeared in Court and reported a verdict in favor of plaintiff and against the defendant in the sum of Five Thousand, Seven Hundred and Fifty (\$5750.00) Dollars.

Now, therefore, upon the verdict of said jury and the evidence adduced and the law of the case, and the Court being fully advised in the premises, it is

ORDERED and ADJUDGED: that plaintiff, Grace Mustell, as Administratrix of the estate of Fred G. Mustell, do have and recover of and from the above named defendant, the Great Northern Railway Company, the sum of Five Thousand, Seven Hundred and Fifty (\$5750.00) Dollars, and costs and disbursements herein taxed at \$116.10.

Done in open Court this 2nd day of October, 1914.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Judgment.

Filed in the U. S. District Court for the Eastern District of Washington, October 2, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Bill of Exceptions.

BE IT REMEMBERED that heretofore, to-wit, on the 18th day of September, A. D., 1914, one of the days of the September Term of the United States District Court for the Eastern District of Washington, Northern Division, before the Hon. Frank H. Rudkin, Judge

of said Court Presiding, this case came on for trial on the pleadings heretofore filed herein.

This was an action at law to recover damages for the death of plaintiff's intestate, alleged to have occurred by said intestate's being run into by a box car of the defendant in the yards of the defendant at Hillyard, Washington, on the 29th day of September, 1913.

Plaintiff appeared in person and by Messrs. Plummer & Lavin, her attorneys, and the defendant appeared by Charles S. Albert and Thomas Balmer, its attorneys, and a jury being duly empanelled and sworn to try the case, the following proceedings were had and testimony taken.

An opening statement to the jury was made by Mr. Plummer for the plaintiff.

Thereupon the following proceedings were had:

The defendant by its attorney, Charles S. Albert, moved the Court to exclude from the jury the consideration of any negligence with reference to the alleged failure to tie down cars in the yard at the time of the happening of the accident. Whereupon Mr. Plummer for the plaintiff, stated that he admitted that they were tied down, and did not intend to claim any negligence by reason thereof.

Thereupon Henry Cantley being called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of HENRY CANTLEY.

My name is Henry Cantley. I am employed by the Great Northern as car checker in the Hillyard yards. I recall the injury and death of Fred Mustell, and was present at the time.

Testimony of HENRY CANTLEY.

Whereupon the following proceedings were had:

Map marked Plaintiff's Exhibit 2 was given to the plaintiff by defendant and it was stipulated that it correctly showed the location of the tracks, buildings and yard and measurements around the vicinity of the accident; that it was drawn to scale one inch to fifty feet, and was admitted in evidence.

I was with him at the time he was struck by the cars. We had just finished checking a freight train when it came in. We were taking the records of the seals and he was marking the destination of the cars, and after we had got that done we were going to the depot and turn in our checks, records of these cars. The place marked "A" on the map shows the place where he was struck. The place marked "B" shows the direction we were going to. The main line is north of Track 1. Think we had finished checking the last cars on Track 5. He and I were crossing about the same time when he got hit.

Whereupon the following proceedings were had:

BY MR. PLUMMER: Q. When you got to track No. 1, or close to track No. 1, as I understand, you and he were crossing about the same time, weren't you, when he got hit?

A. Yes, sir.

Q. When you got close to track No. 1 state whether or not you saw any indication of any train or cars, or backing against this string of cars, that caught Mr. Mustell or anything to indicate that anything was being moved on that track No. 1 in the direction of this string of cars that struck Mustell?

Testimony of HENRY CANTLEY.

A. Well, as we were crossing there we were not paying particular attention to that.

Q. I did not ask you that, Mr. Cantley, I am asking you if you saw anything.

A. I cannot say that I did or did not because we were not paying any attention.

Just before crossing I glanced up that way and saw an indication where the switch engine was by the smoke. I just saw the smoke coming out of there. I supposed out of the engine up there.

Whereupon the following proceedings were had:

BY MR. PLUMMER.

Q. How was that smoke being thrown out? What I want to find out is this whether it was going straight up or whether it was being thrown from the engine as the engine moved, just the facts with reference to the smoke, that is what I want to get at.

A. Well, it was going apparently straight up.

Q. How long have you worked there in the yards, Mr. Cantley?

A. I just begun the first part of the month.

Q. When the smoke is going straight up, what does that indicate according to your experience there in the yard, with reference to the engine standing still or going?

A. Well, I don't know; I can't very well say because sometimes when they are working hard they go straight up, and other times they don't.

Q. Now, Mr. Cantley, did you hear any engine moving?

Testimony of HENRY CANTLEY.

A. Well, I cannot say because they were moving—

Q. Just answer yes or no, if you heard any; now, you can say that, can't you, yes or no?

A. No, I cannot and say it truthfully because—

Q. Cannot say whether you did or did not?

A. No sir.

I didn't see any cars moving on this track.

Q. What was the first indication to you that cars were moving on that track No. 1, if they were moving?

A. I heard the crash of the coupling. The end of the car that Mustell and I were passing by at that time moved very quickly. It hit Mustell.

Whereupon the following proceedings were had:

MR. PLUMMER: Q. Just state the relation between the coming together of the string of cars onto the cars that were standing still that you say you heard the crash,—the relation between the crash and the movement of this car that hit Mustell; what I want to get at is, whether or not it was simultaneous or otherwise.

A. Well, it moved very quickly afterwards; you know how it would be when coupling is made, how quickly the cars would move.

Q. Well, I don't know, I don't know whether the jury would or not; but I just want to know whether there was any taking up of slack or anything of that kind before the other one moved, or whether as soon as the crash came the car that struck Mustell moved practically the same time.

A. Yes sir.

Sometimes the tracks in the yards are crowded and

Testimony of HENRY CANTLEY.

other times they are not very many cars on them. On Track 2 there were three or four cars.

Q. Were you able to see from where you were across there before you did start to cross, were you able to see westerly at all, to see what was coming, or whether anything was coming or not?

A. Well, with that exception.

Q. With what exception?

A. The cars on 2.

Q. I am asking you if those cars you speak of obscured your vision so that you could not see; that is what I want to get at.

A. I don't know exactly—

Q. What I mean?

A. I think I know what you mean all right, but I cannot quite express the idea of it.

Q. Can't you tell whether or not you could see westerly what was going on there?

A. I could see up as far west all right.

I did not see these cars come on to these other cars. I looked.

MR. PLUMMER: Q. Tell the Court and jury then why you could not see these cars that afterwards came against the string of cars that were standing still if you looked and didn't see them.

A. The only thing I know would be the obstruction of view caused by those cars.

Sometimes the tracks were crowded with cars and other times there are not very many.

Testimony of HENRY CANTLEY.

Whereupon the following proceedings were had:

MR. PLUMMER: Q. I believe you described there why you people went across this way, the way you did go to the depot, instead of going up around this way; I want you to just describe the reasons for that; you described it on the other trial, but you have not here.

A. The only reason that I said was because there was better walking out there on the main line is all. We just crossed over there for convenience. I testified on the other trial that the cars up there in that part of the yard there where the shops were, were more or less obstructed; that this was the usual way which we went across. That is true.

Whereupon the following proceedings were had:

It was admitted there was no man on top of the cars that struck Mustell before that car struck him, and there was no man on the ground to warn him that the cars were going to move.

Whereupon the witness was cross examined by Mr. Albert and testified as follows:

MR. ALBERT: Q. Mr. Cantley, how long had you been working with Mustell?

A. That day, or previous?

Q. Yes, that day or previous?

A. Well, we had been out in the morning, and just previous to the accident we had been out about an hour.

Q. Had you been checking that train that you referred to?

A. Yes sir.

Testimony of HENRY CANTLEY.

Q. That train had come in an hour before?

A. Yes sir.

Q. And had been placed on track five, is that right?

A. Yes sir.

Q. Or part of it, or what, do you know?

A. Well, I think the whole train was on track five.

I would not say for sure.

Q. Placed on five and you and he had been checking that. You had completed your check at the time you came up alongside of track five?

A. Yes sir.

Q. And you started over from track five to the place where the accident happened, practically across the tracks?

A. Yes sir.

Q. In going across those tracks, were you engaged in any work which distracted your attention at the time from what you were going to do?

A. No sir.

Q. Were you engaged in any conversation with him at that time?

Q. No sir.

At the time we reached Track 5 Mr. Mustell was ahead of me, a little to my left. I don't know just how far but he was a little to the left, and as I say he was about five or six feet ahead of me, and when the car struck him it knocked him across the rail on the outside, or what is known as the north side of the track, and I had one foot across and I jumped back.

Thereupon the following proceedings were had:

Testimony of HENRY CANTLEY.

Q. And how close, about, was he to the car?

A. How do you wish me to show it, Mr. Albert?

MR. ALBERT: Any way, by pointing it out here, or giving us distances.

THE COURT: Put it in feet, so that it will be in the record if you can.

Q. About how far was it?

A. Oh, about as far from here over to that banister there.

THE COURT: Indicate it in feet if you can, Mr. Witness.

A. Well, about three or four feet, somewhere along there, I wouldn't be positive.

MR. ALBERT: Q. You think it was as far as from the arm of the chair to the corner there (indicating)?

A. Yes sir.

Q. Have you got a ruler here?

THE COURT: Oh, it can be estimated, about three or four feet—he said three or four feet.

MR. ALBERT: Can I measure this?

MR. PLUMMER: How are you going to get that in the record?

MR. ALBERT: I will ask him to measure that.

MR. PLUMMER: He said three or four feet.

MR. ALBERT: Q. (After measuring distance) The distance between this chair and the corner of the rail is two feet.

MR. PLUMMER: He is only estimating it. It cannot be confined to inches or anything of that kind.

Testimony of HENRY CANTLEY.

MR. ALBERT: Q. Now you spoke of them moving very quickly. I wish you would describe what you mean by that.

A. Well, in kicking as a usual thing, when they kick down—

MR. PLUMMER: We object to what is usual.

MR. ALBERT: That is the only way that the witness can tell.

MR. PLUMMER: No.

THE COURT: Describe this particular movement.

A. Well, when the engine comes into contact with the cars—

MR. PLUMMER: Just a moment. I have not asked you that.

MR. ALBERT: No, you have not asked him. I am asking him. You object.

THE COURT: He can testify in his own way. You may answer.

A. I mean when the engine hit these cars they moved very quickly and just as—well, I could not explain it in any other instance than comparing it with another.

I could hear the crash of these cars up ahead only at the time they struck.

Q. Could you hear the slack being taken up?

A. Well, I never paid any attention to that.

Q. Did you pay any attention to the fact that there was or was not an engine working up above there?

A. Nothing, only as I said before, saw the smoke.

I don't know how far those cars moved after they struck. These yards are practically level from the point where we were crossing west to the depot.

Testimony of HENRY CANTLEY.

Whereupon the following proceedings were had:

Q. And in walking, you could have walked, if you and he wanted to, between tracks one and two, without any difficulty, isn't that a fact?

A. Yes sir.

Q. And you could have gone up to the lead and walked along the lead and walked across right at the depot?

A. Yes sir.

Q. Without crossing anything out there to the main line, isn't that right?

A. Yes sir.

Q. And there was plenty of room between the two tracks, tracks one and two, between any one of those tracks, four and five, or four and three, and so on, for you to have walked up there, if you had wanted to?

A. Yes sir.

Q. Mr Plummer asked you about the usual way in which you crossed there at this particular point. Do you recall any other time that you ever went over at that particular point before?

A. Well, we never paid any particular attention to the particular parts where we are going when we are busy.

Q. You go back and forth across the tracks anywhere you want to, don't you?

A. Yes sir.

Q. And you got up and down in between the tracks, or did at that time, wherever you wanted to?

A. Yes sir.

Testimony of HENRY CANTLEY.

Q. You and Mustell and these other employees—well you and Mustell, that is right, isn't it?

A. Yes sir.

Whereupon the following proceedings were had:

MR. ALBERT: Q. What do you mean by saying you went the usual way across there, Mr. Cantley?

A. Well, just a way to get to the depot, out on the main line and up the main line.

Q. It was just as near, was it not, to have gone up between these tracks and on to the lead and across?

A. Yes sir.

Q. And it was just as good walking, was it not, in there as it was over between the other tracks?

A. The only difference is that the cinders were loose there, and they were packed on the main line.

Q. But it was level, and you could walk right along on them?

A. Yes sir.

Whereupon the witness testified on redirect examination as follows:

MR. PLUMMER: Q. And this distance that you have illustrated here a while ago was given to you upon a suggestion by Mr. Albert, wasn't it?

A. I don't know as it was, no sir.

Q. On the trial of the other case.

A. The only thing, as I said before, I would not swear to the distance, and I won't now.

Q. That is what I say, whether it was one foot or ten feet?

A. No sir.

Q. But that was done, wasn't it, upon a suggestion

Testimony of THOMAS D. FARMER.

of Mr. Albert?

MR. PLUMMER: Q. Irrespective of your judgment as to that distance?

A. Well, the only reason I gave that was because they wanted to know, and I said that I could not give any definite distance.

Q. And you wanted to say something?

A. Well, I had to answer the question some way.

Whereupon, on recross examination, the witness testified as follows:

I testified on the other trial substantially as I did here, that the distance was about so much, between two and three feet and at that time I said the distance was from two feet up, I couldn't tell exactly.

THOMAS D. FARMER, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

I reside at Cheney. In the month of September, 1913 I was engaged on the Great Northern, switching in the yards as switchman. I recall the accident to Fred Mustell. I was one of the helpers. There is a foreman, field man and a man that follows the engine. I was the man that followed the engine. The first I seen Mustell was when they brought him up to the depot. I didn't see him hit. There were eight or ten cars that were standing still before they hit him. They were standing on track one. I made a written statement before the other trial. I can not read the statement, it is in Mr. Lavin's handwriting. At that time I figured

Testimony of THOMAS D. FARMER.

there were fifteen. I couldn't say whether it was fifteen, or eight or ten; it was somewhere in there. Our crew coupled into those cars that were standing there. We put some cars in on track one and I suppose the head car struck Mustell. We put some cars on track one that struck the string that struck Mustell. Mr. Steinhouse was foreman of the crew. We were preparing the cars and carrying on the switching under his direction. We put the same amount on there that was already on track one. The whole two strings would be about sixteen or seventeen cars. Speaking of the string that struck Mustell as string No. 1 and the string we put in there as string No. 2, we cut off string No. 2 from the engine. When string two was coupled to the engine I made the coupling to string one and then I cut the cars off. I made a coupling with the two strings of cars and then cut the engine off. After I cut the engine off these two strings of cars went about four or five cars I should judge. The engine was not shunting these cars. It started them and I cut the cars off and they rolled down. The four or five car lengths this double string moved, they moved those on their own momentum by reason of the shove of the engine. That was done under signal and under orders. I could not say where the field man was when this happened. There was no man on the top of string two that we shoved in there. Miller made the coupling and that was all he did. There was no man at the brake on string two. There was no warning given of the movement of these cars, either by the ringing of the engine bell or whistle or anything of that kind that I heard.

Testimony of THOMAS D. FARMER.

Whereupon the witness was cross examined by Mr. Albert and testified as follows:

I was not paying any attention to any warning by any bells or whistles. In switching we do not pay attention to whistles or bells. We were down in the yard and we came up out of the yard with a string of cars and pulled up by No. 1 switch and took them in on No. 1. There was a string of cars on track No. 1, coupled into them and cut the cars off and then this string moved on down the track. Taking this map here, we took some cars off of some of the tracks; will say, four, five, six, seven or eight, took these cars up on this lead that leads up towards the depot and pulled them up to clear track No. 1. At that time there was standing on track No. 1 some eight or ten cars. I don't know just how many. We came in and coupled on to that string and kept on shoving down the yards. That was the movement that took place there. I cut the string after we coupled and started to shove down. The engine and string kept on moving right down the track after the coupling was made until the cut. The cut was made after we had moved somewheres around a car length after they were coupled, and the cars kept on shoving down there, altogether about four or five car lengths. Steinhouse was the foreman in charge and he gave the signals. Miller was the field man that did the coupling and uncoupling. He was the one that was farthest from the engine. I followed the engine. The cut was made about four or five cars from the engine. Miller made the coupling.

Testimony of THOMAS D. FARMER.

Whereupon the witness testified on redirect examination as follows:

BY MR. PLUMMER: Q. Mr. Farmer, I will ask you if you did not state to Mr. Lavin and myself in our office—first I will withdraw that. I will ask you if this is your signature.

A. Yes sir.

Q. Just follow this right from there so you will see I am not reading it different from the statement you signed while I ask you a question. I will ask you if you did not state to Mr. Lavin and myself with reference to this switching, as follows; before the first trial of this case, and that you also testified to it at the last trial of this case: "Just before cars taken in by us reached cars standing on track 1 Foreman Steinhouse ordered me to cut cars off and I did so, and cars struck the cars standing on No. 1, bumping them back four or five car lengths."

A. Yes, I did.

Q. And is that true? A. Yes, sir.

Q. Then the engine did not shove the cars after the collision between the engine—

A. Yes, they did.

Q. Just a moment. Then the engine did not shove the cars after it coupled into them, at all, did it?

A. Yes sir.

Q. Since the last trial of this case, you have been up into Mr. Albert's office on numerous occasions, and he has talked to you about this case, notwithstanding the fact that you were subpoenaed as our witness and was called by us at the former trial, and re-hashed and

Testimony of THOMAS D. FARMER.

and rehearsed your testimony in his office on two or three occasions, haven't you?

A. I have been up in Mr. Albert's office, yes, sir.

Q. And he has been talking to you about your testimony and what you knew about the case?

A. He said very little to me about the case.

Q. I didn't ask you how little or how much; he has been talking to you about it, hasn't he?

A. Yes sir.

Q. And when you made this statement that I have shown you, you had not talked to Mr. Albert or Mr. Ryan, the claim agent at all, had you? A. Yes sir.

Q. Didn't you testify—

A. I talked to Mr. Ryan.

Q. You talked to Mr. Ryan?

A. Yes sir.

Q. But you did not talk to Mr. Albert.

A. No sir, I did not.

Q. Now, since you have talked to Mr. Albert, after making this statement that you cut the cars off and they came in collision with the other cars which caused them to move four or five car lengths—

A. I didn't say it was just before the cars was coupled—

Q. Wait a moment. You now say that you moved into them and moved up about a car length before you cut them off?

A. Yes sir, we moved into them and as soon as I could get over there and cut the cars off I did so.

Q. What do you mean by saying, "Just before cars taken in by us reached cars standing on track 1, Foreman

Testimony of THOMAS D. FARMER.

Steinhouse ordered me to cut cars off and I did so, and cars struck the cars standing on No. 1, bumping them back four or five car lengths." Is that true?

A. That is true.

Q. If it was necessary to move that string of cars four or five car lengths, was there anything to prevent the engine from pushing them on that distance and then cutting off?

A. No sir.

MR. PLUMMER: That is all.

Whereupon the witness on re-cross examination testified as follows:

Defendant's Exhibit 4 is the statement Mr. Plummer was calling to my attention.

Defendant's Exhibit No. 4 offered and received in evidence without objection.

With reference to the statement: "Just before cars taken in by us reached cars standing on Track one, Foreman Steinhouse ordered me to cut cars off and I did so, and cars struck the cars standing on No. 1, bumping them back about four or five car lengths" the sequence of how these things happened was when we were backing in, just before we coupled on the other cars, Mr. Steinhouse told me to cut the cars off at a certain place, which I went to do, and before I got to where the coupling was they coupled up and I pulled the pin. That there is where you get "just before" in that statement. It was not meant just before the cars were coupled that I cut them off.

Whereupon the witness on redirect examination testified as follows:

Testimony of THOMAS D. FARMER.

BY MR. PLUMMER:

Q. Why was it necessary for you to go up and see Mr. Albert if you were only to go and tell what the facts were?

A. I went up to Mr. Albert's office, and he told me "All we want is the truth, and nothing but the truth."

Q. And you read over your former testimony in his office didn't you?

A. I read part of it.

Q. Part of it?

A. Yes sir.

Q. What did you do that for?

A. Because I did.

Q. I say, what did you do that for?

A. Because I wanted to.

Q. Why?

A. Because I did, that is all.

Q. That is the only reason you can give?

A. Yes sir.

Q. You talked it over as you read it over with Mr. Albert?

A. No, sir, I was right in the little office.

Q. In his side office there. What do you mean then by this in this statement, "I did so, and cars struck the cars standing on No. 1 bumping them back four or five car lengths," if you say now that the engine shoved them back part of that distance?

A. It did.

Q. Why do you say that the contact bumped them back?

Testimony of C. H. GEPHART.

A. They were coupled up and I cut the cars loose, they went down four or five car lengths.

Q. Of their own momentum?

A. Yes sir.

Q. All right.

MR. ALBERT: Just one question. You have been subpoenaed here by me?

A. Yes sir.

MR. PLUMMER: After we did.

THE WITNESS: Both times.

MR. PLUMMER: That is all, Mr. Farmer.

C. H. GEPHART, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

I am general yardmaster of the Great Northern at Hillyard, Washington; have been in that position about four years. The last time I was here before. I have been around the Hillyard yards about ten years.

Q. I will ask you to state whether or not the same customs exist now as had existed during that time in that yard, with reference to switching operations, the movement of cars, and the giving of signals, if any, or the failure to give them, if any, and all things incident thereto if they are the same now that they have been during the ten years that you have been there, or substantially so.

A. Practically the same.

On re-direct examination by Mr. Plummer the witness testified as follows:

Testimony of C. H. GEPHART.

Q. State, Mr. Gephart, about how many are employed in the shops there first, generally?

A. Why, I should judge they would average from two to five hundred.

Q. Two hundred to five hundred?

A. That is the shops and roundhouses.

Q. How many in and about the yards and other shops and places around there?

A. Well, I made that as a bulk.

Q. For the whole thing? A. Yes, sir.

Q. Can you state just the different classes of men in the yards with reference to what they are called, I suppose section men and car cleaners. Just tell what they are you can tell better than I can.

A. Why, there are usually five or six switch engines working in the yard, and a switch engine consists of an engineer, fireman, foreman and two helpers. As I said there is five or six of them. And then there are two shifts of car inspectors and oilers and air men that consists of about six men in a shift, twelve hour shift.

Q. How many shifts are there?

A. Twelve hour shifts, two shifts, and there are car clerks, usually about two days and two nights, that goes out in the yard and call boys around the yard more or less, and general yard master.

Q. What with reference to train crews?

A. I have not got to that yet.

Q. All right, I was trying to get along, that is all.

A. And assistant yard masters, one or two usually, special agent—watchman I should say in place of special agent, and special agent sometimes too, conductors and

Testimony of C. H. GEPHART.

brakemen going to and from their trains, leaving the terminals and arriving at the terminals. I should judge there is about—Oh, possibly eight trains in a day, six to eight trains in a day, and six to eight trains out in twenty-four hours.

THE COURT: I think that gives the jury a sufficient idea.

MR. PLUMMER: I think so. Just one more question.

Q. With reference to the men that are employed in the yard, and also this part of the yard over here where these buildings are shown, the machine shop and so forth, state whether or not practically all of these men here go across the yard live at Hillyard, the town being on the north part of this map, the main part of the town?

A. I can show the Court and jury if I had a ruler there, about where the shop men cross.

Q. I am not asking you for the exact spot where they cross, because they cross at different places, but just show generally where they cross to that side of the yard. I don't care about the particular place that they cross.

A. They cross to the west of the depot as a usual thing, there is a little walk.

Q. Answer my question; do they cross over these tracks, some part of the yard, to get over to Hillyard?

A. They cross some part of the yard, yes sir.

Q. And at the end of the ice house, near this spot where Mustell was killed, state whether or not there

Testimony of C. H. GEPHART.

was an opening from the street into the yards across the north end of that ice house?

MR. ALBERT: That is objected to as immaterial. It has nothing to do with this duty owing to this man.

THE COURT: He may answer yes or no.

A. Yes sir, there is an opening.

On re-cross examination by Mr. Albert he testified as follows:

Q. That opening is blocked by some ties and things thrown in there, isn't it?

A. Yes, sir and sawdust.

Q. At the time of the accident what was the situation there?

A. About the same as it is now. There is a pile of sawdust and ties in there, and walked behind it to get an opening into the stret.

Q. Men in the machine shop, and these other shops around here, where do you say they cross with reference to the depot?

A. Here is the depot, right here, and here there is a little crossing, right in here, between these two switches, I think it is.

Q. Two switches just north of the platform east of the store house, is that right?

A. Yes, somewhere in there. There is a little crossing, and these men come around there and go over the depot platform, from this side of the depot or that side of the depot, and some of them cross over here and some of them cross over there.

Q. That is, cross over to the machine shop?

Q. The men who were employed in the yards are

Testimony of D. ELMER MURPHY.

the yard clerks, car checkers and car inspectors and the crews, the switching crews and train crews?

A. Yes sir, and the yardmasters.

Q. In other words, those employed in yard service include the ones that you have just mentioned?

A. Yes sir.

Q. Car repairers work down here on these tracks south of the track scales, as they are now constructed, is that right?

A. The rip track men work in there somewhere.

Q. And the other tracks, one to nine inclusive, are what are called classification tracks, aren't they?

A. One to ten inclusive.

Q. And on those tracks the trains are made and broken up and switched in and around in a series of ways?

A. Yes sir.

Q. Switching is carried on on all those tracks at different times during the year, though?

A. From one to ten inclusive, yes sir.

Q. The full length of the yard?

A. Yes sir.

D. ELMER MURPHY, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

I reside in Hillyard. I follow braking part of the time. I worked in Hillyard two nights five years ago. I handled trains in and out of the Hillyard yards for nine months. There was seventeen days during that time I was not working. This was in the year 1909 and 1910.

Testimony of D. ELMER MURPHY.

WHEREUPON the witness was cross examined by Mr. Albert and testified as follows:

I started making trips on the 14th day of August, 1909, and worked until 27th day of January, 1910. I resigned and went back to work on February, 14th and then worked until May 21st, 1910.

On re-direct examination he testified as follows:

Q. As you understand from railroading, the object of having a man on the end of this car is to protect anybody that might be injured by the car moving, isn't that right?

A. Yes sir.

On re-cross examination he testified as follows:

Q. If fifteen or twenty box cars only going sufficiently far to go two or three or four or five car lengths, you would not think it would be necessary to put a man on the end there, would you?

A. No lots of times they do not.

Q. And that is the way it was in the yards while you were working there, wasn't it?

A. Well, I never worked at this job, no.

Q. I mean while you were observing the things going on in the yards? A. I have observed it that way, yes.

Mr Albert: Q. You put a man on top to protect these switches or any movement over the hump, wouldn't you?

A. Well, it is to protect everything according to my idea.

Q. How?

Testimony of D. ELMER MURPHY.

A. It is to protect everything that a man is put on there.

On re-direct examination he testified as follows:

Q. (By Mr. Plummer). If you are bringing in a string of eight cars for the purpose of coupling on to a string of eight or ten more cars, which eight or ten more cars were standing still, and you were bringing these other cars against them for the purpose of placing those four or five car lengths further on, there is no occasion then for uncoupling the engine until you had placed the cars by pushing the cars these four car lengths, is there?

A. No, for one reason it is not, but it is a matter, I have known lots of fellows to do it.

Q. I know, but lots of fellows get killed too. But if they want to place these eight or ten cars four car lengths further on, when the engine has got hold of all of them, if that is the purpose, you keep on shoving—he will keep on shoving, won't he, until he shoves the whole length?

A. Yes sir.

Q. Is there any occasion for a collision between those moving cars and the string of eight or ten cars sufficient to cause those eight or ten cars to move almost instantly, the full string, in order to place the cars down there four car lengths?

MR. ALBERT: That is objected to, no proper foundation laid.

THE COURT: It is not a proper question for expert testimony. It is a question for the jury.

Testimony of D. ELMER MURPHY.

Whereupon the witness, upon re-cross examination, testified as follows:

By MR. ALBERT:

Q. The occasion depends upon what is wanted to be done with the cars, isn't it, and the engine, what other switch movements are going to take place in the yards?

A. I don't get that now.

Q. I say the occasion for shoving these cars in that particular manner would depend upon what else was wanted to be done, or what other switching was wanted to be done in the yards, wouldn't it?

A. Well, I suppose so.

MR. ALBERT: I will put the question again. The occasion for shoving the cars down four or five car lengths would depend upon what they wanted to use the track for, or what they wanted to use the track for, or what other switching they wanted to do in the yard, wouldn't it?

A. I don't know whether they would or not. I don't know what their idea would be.

Q. All right, take a drop switch. You have a drop switch and a flying switch and a kick switch. I think we are all agreed upon what a flying switch is. A flying switch is a switch where the engine goes down one track, either pulling some cars behind it, for instance, from the east end, and they throw the switch after the engine has gotten by it, and some cars go down the next track?

A. Yes, sir.

Testimony of D. ELMER MURPHY.

Q. And the engine stops and allows the cars to go on by, is that right?

A. Yes, sir.

Q. And a kick switch is when you put a string of cars in on a track, and back down, for instance, on the track, and suddenly stop your engine and send the cars on down a considerable distance on down the track, isn't that right?

A. Yes, sir.

Q. And a drop switch consists of—put it this way: as a matter of fact, there is a different understanding as to just exactly what a drop switch is, isn't there, on different roads?

A. Well, according to my opinion a drop switch and a flying switch is both the same thing.

Q. Let me call your attention to this also, that upon some roads a drop switch and a flying switch are the same, and upon others the drop switch is, is it not, where the car that is to be moved is on a higher grade than the engine, and the engine simply leaves that car on the track, and the car goes back down by the engine on account of the gravity?

A. Yes, sir.

Q. You said that lots of fellows do uncouple engines when they make shoves down there such as you have described, is that right?

A. Yes, sir.

Q. And that was what you observed during your period of acquaintanceship with these yards over there in Hillyard, is that right?

A. No, not in Hillyard altogether.

Testimony of D. ELMER MURPHY.

Q. I mean you have observed that in the Hillyard yards while you were over there working there on the road or in the switching capacity?

A. Yes, I guess I have.

Whereupon the witness on redirect examination by Mr. Plummer, testified as follows:

Q. With reference to a string of cars that is standing still in the yards, how are those cars, before any of the cars are coupled to them, and assuming these cars had been there for some little time, what is done to those cars to hold them there, so that they won't roll or move?

A. Well, there is generally always brakes tied on them.

Q. That is what they call tied down, isn't it?

A. Yes, sir.

Q. And if it is intended to move those cars at all the brakes are thrown off, aren't they?

A. Yes, sir.

Q. Before they are moved?

A. Yes, sir.

Q. Well, if it was intended to shove these cars further on to some other point, state whether or not they would crush other cars into them, as was done in this case, so as to move the whole string instantly, without taking the brakes off, if they are tied down?

MR. ALBERT: I object to that as improper, incompetent, no proper foundation laid and an issue for the jury, if it is an issue for anybody.

THE COURT: He may answer. I want to get through with this witness some time, though. Answer the question.

Testimony of THOMAS KNEELAND.

A. Yes, sir, I have seen it done, brake the cars to slow down the others, and not allow them to run too far. Probably they wanted to take them to be repaired. I have seen it done where they would put the cars up and not probably want the rest of them to run away, hold them up close to the yard.

Whereupon the witness upon re-cross examination testified as follows.

They do not tie down cars so they are immovable altogether. As a matter of fact they tie cars down with hand brakes on purpose to move them, by throwing cars in against them, and to hold them and not let them get too far. Probably they would naturally move a little. It is the purpose and intention when cars are tied down that sometimes in connection with throwing cars in against them or shoving cars in against them, they intend that those cars shall move when the cars hit them and make more room for cars on the other end of the switch track if they hit them hard enough. I have seen that done in the yards.

THOMAS KNEELAND, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

I have had about fifteen years experience as a switchman and brakeman on the Omaha, Northern Pacific and S. P. & S. The last place I worked was Vancouver, Washington. I was just a helper in switching.

Q. If there is a string of eight cars standing on a track in a yard and you want to move these cars up a

Testimony of THOMAS KNEELAND.

distance for piling for instance, is there any necessity for making—for doing that by a kick switch?

A. Why no, if they were kicked in there there would be a man on them to see that they coupled, that a coupling was made. The proper way to do would be to place this engine and let him kick the head to see whether the cars were coupled up or not, because they are liable to run out the other end, if it is a yard where there is a hill at both ends.

Q. If the engine is coupled onto the end of the cars?

A. You ought to have a man on the hind end to see whether there is a brake step on there or not.

Q. They could be shoved in a distance of four car lengths and placed without doing any kicking?

A. Yes, if there is room enough.

On re-cross examination by Mr. Albert he testified as follows:

I just came back from work on a ranch at Green Bluffs. I am not employed at present.

Whereupon the following proceedings were had:

In connection with the cross examination of Thomas Steinhouse, a witness called on behalf of the plaintiff, the following rule was offered by Mr. Albert on behalf of the defendant and admitted.

Rule 102: "When cars are being pushed by an engine (except when shifting and making up trains in the yards), a brakeman must take a conspicuous position on the front end of the leading car and signal the engineer in case of danger."

Testimony of M. T. O'BRIEN.

M. T. O'BRIEN, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

I reside at Yardley. I have had 16 years' experience as a railroad man. I worked for the Great Northern. I left the service August 3rd, 1910. I was discharged.

Whereupon the witness was cross examined by Mr. Albert and testified as follows:

They frequently, in switching cars in the yards there throw cars down on several tracks, not at once exactly. Their momentum was stopped to a certain extent. If they were not going very fast they would stop themselves. They would not go over a couple of car lengths after they were cut off something like that. I have never seen them go over four or five car lengths unless they would keep on going, unless there was a man on top. They frequently threw cars down these different tracks while I was there. Usually had a man on part of the time, long enough to set the brake. A man would have the brakes set on them and they would probably go thirty or forty feet. That has happened frequently while I was in the yards. I have testified before in this case against the Great Northern. I was discharged on August 3rd, 1910, for my responsibility in a head-on collision.

Whereupon the witness on re-direct examination testified as follows:

In coupling a string of cars into another string of eight or ten cars, in order to make that coupling it is not necessary to move any of the standing cars at all.

Testimony of M. E. SNYDER.

Whereupon the witness, on re-cross examination, testified as follows:

By MR. ALBERT:

Q. Suppose you were going to do something besides coupling on to them, would it be necessary to use some force to take them down the yards a ways?

A. It all depends; if there was about one hundred cars you would have to use a good deal of force.

Q. If you had to send them four or five car lengths you would have to put on enough power with the engine to get them down that far, wouldn't you?

A. You could start them easy, you know.

Q. You have to send them four or five car lengths, if it is necessary to do that, if that is what you intend to do, you have to use enough power to do it, don't you?

A. You kick them after you couple into them, you see.

Q. You kick them after you couple into them, and send them four or five cars; is that the way you do it?

A. Yes.

Whereupon the following proceedings were had:

It was agreed between the attorneys for the respective parties that Mr. Mustell was night yard clerk in September, 1909 and he was night yard clerk from that time on until October 1st, 1910 when he became day yard clerk. He became in January, 1911, weight master and shortly after that he became manifest clerk and car checker, and continued in that employment until the time of his death.

M. E. Snyder, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

Testimony of M. E. SNYDER.

I have been in the employ of the Great Northern Railway Company as engineer. I have worked on the road and around the Hillyard yard. It has been two years and a little over five months since I have worked in the Hillyard yards. I left the service on April 2nd, 1912. In coupling into a string of cars standing on a track, a string of eight or ten cars, and you want to *couple* into those cars for any purpose, it is not necessary to move any of those cars that are standing still.

MR. PLUMMER: Q. And in case they are moved after they are coupled into, state how the movement is carried on, whether violently or whether easily?

MR. ALBERT: I object to that as a general conclusion; it is invading the province of the jury.

THE COURT: Sustained.

Whereupon the witness was cross examined by Mr. Albert and testified as follows:

It is not necessary to move them provided the engineer gets the proper signals.

Q. I say, there were times when you wanted to get cars down the tracks some distance, you not only wanted to couple on to them but you wanted to move them?

A. Yes, of course there was.

Q. When you wanted to move them you would not just couple into them but you would keep them going?

A. It is customery there to couple on and shove them down, the man on the rear end riding the car that goes down.

They did at times shove them down two or three or four car lengths without putting a man on the end of the car.

Testimony of M. E. SNYDER.

Q. Well, it frequently happened that they did not have men on the cars if they were not going down over the hump?

A. That depends what kind of start they gave the car. If they just slacked the car back or gave it a little bump back, sometimes it was not necessary.

Q. How far would they start and send it?

A. Well, it depends on the track; if you would be going down hill, the car would never stop.

Q. Or on the other side?

A. Well, if the car happened to be on the level or in a sag—a place where the track sagged, she would probably stop. The foreman would have to use his judgment about cutting his cars off on that kind of ground. It is all according to the foreman, who cuts the cars off of the string, and who has got hold of the engine.

Q. He has to use his own judgment where he cuts them off?

A. He is not supposed to cut them off any faster than the field man can ride them in.

Q. But if they were going only three or four car lengths, they would not ride them in, if they were not going over the hump?

A. Well, if he can see where it is going, it is up to the foreman to see where his cars are going, and he is responsible if he cuts off cars and sends them where he cannot control them.

I had a law suit against the Company, which is still pending. I testified in the other trial of this case against the Company.

Testimony of E. G. MILLER.

Whereupon the plaintiff rested and the following proceedings were had:

Defendant moved the Court for a non-suit on the same grounds as hereinafter set forth in the defendant's motion, to direct a verdict at the close of the case, which motion was denied and excepted to by the defendant.

Whereupon counsel for defendant made the opening statement of the defendant to the jury, and introduced the following testimony:

Defendant's Evidence

E. G. Miller, a witness produced by the defendant, being first duly sworn, testified as follows:

I have ben switching for 14 months in Hillyard. I was in the crew at the time of the accident. I was field man. Mr. Steinhouse was the foreman and Mr. Farmer was the engine follower. There were about eight or ten cars on track one and we went down the lead. I can not say exactly which track it is., and we got a bunch or probably seven or eight or nine or more cars and came up from No. 1 switch, stopped and reversed the engine and backed in on No. 1. I was fixing the coupling on the end of the car that was attached to the engine and as we made the coupling I gave the cut signal and we shoved them on and cut them off. The cut was made probably a car or a car and a half after I had made the coupling. The cars kept on going. First, before we made the coupling, we rolled down against them, the pin did not drop and I dropped my arm. The engin-

Testimony of E. G. MILLER.

eer stopped and I signaled him on back and we made the coupling. We came down against this cut of cars standing on No. 1 and we didn't hit them hard enough to drop the pin down, and I seen the coupling did not make and dropped my arm and the engineer stopped. The two cuts lacked possibly two feet, so we didn't make the coupling by two feet. Then I gave him the signal and he came on back against us. With reference to the slack in the cars, we know what slack is from the springs, that is, in the draw bars. Of course, if he squeezes up a bunch of cars and then releases them, there is bound to be some slack run from them. The cars didn't couple up the first time and the slack ran out. When the slack ran out the cars were about two or two and a half feet apart. Then I signaled them on back down and they came right on through. The train was altogether after they were coupled up and it moved probably a car or a car and a half; I couldn't say exactly, something like that. The string of cars was moving eastward on down One. I was walking on the ground just a common ordinary walk. The string was rolling on opposite me and not going any faster than I was. I didn't know Mustell was around at the time. I didn't see him fall. We were not going on through the yards with that string of cars. We were going to shove them back three or four car lengths for a little room, for two or three more cars. The aim was to put in some more on top of them.

I had been employed about three or four months before in the yards. We made similar movements to that every day. I couldn't recall how many; according to how

Testimony of E. G. MILLER.

many trains was in, how many cars you have to handle. That is a very similar movement to doing switching. These yards are used for the making up and breaking up of trains and are known as classification yards. The hump is in the center of the yards near the word "yard." The rest of the yards is level. East of that it slants to the east.

I have known Mustell and see him around there in the yards while these movements were going on. The movement that took place there was a shove. A shove switch is a switch that you go down against a bunch of cars and have them all coupled together and shove them down the track, and cut off when you go to leave them. The engines are all headed west in the yards, so the engineer can get the signals always on the same side, the north side.

Whereupon the witness was cross examined by Mr. Plummer and testified as follows:

There is a difference between a shove and a kick. A kick is where you start the cars by the engine and let the cars go. That is not what we did here. To a certain extent we shoved the cars. The cars probably rolled two or three car lengths after we cut off from them, as a result from the shove of the engine. Cars that are started by the engine and let go is a kick. I don't recall the particular train that was being switched when I saw Mustell in the yard. In carrying on our switching operations we didn't pay any particular attention to Mustell or the car repairer or any other fellow working around the yard to see where he was. I couldn't say how far it was from this lead on No. 1 down to where

Testimony of E. G. MILLER.

Mustell wts hurt, probably seventeen or eighteen or twenty cars. When the engine was cut off it was standing probably a car east of No. 1 switch. It is not a fact that we took this string of cars with that engine and cut the cars off and allowed them to go into this other string of cars that was standing still. We were intending to place these cars where they were afterwards placed. I didn't say we kicked them in there. We shoved them in there. We let them roll in order to save a little time. There was no particular use running in there and leading them around. When the engine bunted into these cars it didn't hit hard enough to make the pin drop. It didn't move the whole string of cars and kill Mustell. I didn't say I saw Mustell at all. I can't say it moved the whole string suddenly; I don't know. I say the pin did not drop, and the engine stopped, and I signaled him back and made the coupling. The first time it never moved the string of cars. It might have moved the first car an inch or two.

Q. And then you say the engine backed up? Yes, sir.

Q. How far? A. I could not say.

Q. Well, about how far? A. Probably two or three cars.

Q. It backed up two or three cars? A. Yes sir.

Q. And then came against the bunch of cars again?

A. It could not back up, the cars was only apart about two or three feet, and it only had two or three feet to back up until we had been into them again.

Q. What I want to get at is how far this string of cars that the engine had hold of pulled away from the

Testimony of E. G. MILLER.

string that was standing still, after you first tried to make the coupling on it, and it didn't make?

A. About two feet and a half or three feet. This string of cars the engine had hold of pulled away from the string of cars that was standing still after we first tried to make the coupling on it, about two feet and a half or three feet. The string of cars hooked to the engine came back against the string on No. 1 a second time. It hit hard enough to make,—I couldn't say it hit hard enough to move that string of cars forward quickly that was standing still. I don't know. I was right there but I wasn't at the end. I don't know whether they moved or not. The string of cars we came against were tied down.

Q. You said you wanted to move them forward. Don't you usually take the brakes off when you want to move them forward?

A. Well, hardly.

Q. You leave them tied down? A. Yes sir.

Q. The engine comes against them with sufficient force, regardless of the brakes, to move them forward suddenly?

A. No sir.

Whereupon on re-direct examination he testified as follows:

I couldn't say whether the end car moved suddenly or not. That is the question he asked me, if they moved suddenly. I could not say, I was not down there. I made the coupling and that was all the farther down the string I was. In shoving cars in there that the brakes are tied on to we didn't take the brakes off, if

Testimony of H. E. CHRISTOPHER.

we wanted to shove them on a ways. A kick is when we get up on what is called the switching lead and the pocket leads alongside the main line. We start to give the cars a start and stop, just like you would slip them two or three at a time down the lead and turn them in on different tracks. That is kicking cars. When we shove we couple into them and shove them back. We turn them loose and let them roll a little ways. We don't particularly stop them unless there is an awful string of them. At no time did we pay any particular attention to Mr. Mustell or the car repairers around there where we were switching in the yard.

Whereupon, upon re-cross examination, he testified as follows:

It was 1025 feet from the lead to the point where Mustell was killed. It shows on the map. The cars are forty feet long. I can't say for sure how many there were in this double string, probably fifteen or eighteen or twenty. You have to shove about two or three or four car lengths on on One to clear that lead. That lead is catorcornered across the yards there.

Whereupon, on re-direct examination, he testified as follows:

I do not know exactly how many cars they were going to put in there.

H. E. Christopher, a witness produced on behalf of the defendant, being first duly sworn, on examination testified as follows:

I have been a locomotive fireman on the Great Northern for two years on the 4th of September. In September, 1913, I was engaged in switching in the west end

Testimony of H. E. CHRISTOPHER.

of the Hillyard yard. That was the time Mustell was killed. We were putting some cars in on No. 1, how many I don't know, and had left them there and gone back to another part of the yard and got some more and had shoved them in also. I didn't see the accident. I was on the other side of the engine. The first thing I knew of the accident was when the engineer called me over to his side and told me we had run over somebody or hit somebody, or words to that effect. Just previous to that I had been down on the deck putting in the fire. I was down there at the time. I know Mustell by sight and by name, had seen him in and around the yards checking. He was weigh master and he posed as weighmaster a great deal. He used to weigh cars a good many of them. As weighmaster it was his duty to go down there at the scale when we weighed cars. We would shove a car on the scale and cut off and he would weigh the car and we would kick it off. and he would weigh the next one that came on and so on. I never saw a man on the end of the car that was kicked off. I have seen him weighing a good many times. That was on Track No. 1. In kicking those cars against each other they didn't have a man on the end of either of the cars, either of the string of cars, the far end that was being kicked into, or the car that was being kicked against that train. He has often ridden in the engine with us from one end of the yard to the other and things like that under my personal observation.

Whereupon the following proceedings were had:

MR. ALBERT: There is one phase of this case that I don't know whether there is going to be any claim on

Testimony of H. E. CHRISTOPHER.

or not; I did not notice any evidence introduced in plaintiff's case with respect to it, and that is with reference to the question of bell or whistle signals. Do you make any claim on that, Mr. Plummer?

MR. PLUMMER; Certainly. We claim you ought to have a rule for some manner of warning, and you didn't have any.

MR. ALBERT: There is no claim that there was any custom in the yards as to bells and whistles?

MR. PLUMMER: I don't know anything about that, whether there is or not. We have not offered any proof to show any custom as to bells and whistles. I will say that the only thing we will claim with reference to bells and whistles is that if they had been given, it would have tended at least to warn plaintiff of the imminence of his danger. We have not offered any proof to show that it was customary to ring a bell or that it was not, but we do insist that that is one of the ways that a rule could have been prepared to give warning.

Whereupon the examination of the witness was continued and he testified as follows:

At the time or just before this movement I was putting on fire when he hit the cars. I knew when he hit the cars but I didn't notice anything more. There was no effect on my movement on the gangway that I noticed. I was not knocked around or anything of that sort. I have heard the movement described that happened at the time Mustell got hurt. I have heard the testimony of Mr. Cantley and Mr. Farmer and other witnesses who testified directly to it. That movement and similar movements had happened in the yard before that time,

Testimony of WALTER LAW.

it was a very frequent occurrence. It comes under the head of every day switching. It has been going on during the two years I have been in the service.

Whereupon witness was cross examined by Mr. Plummer and testified as follows:

I am in the service now as locomotive fireman and hold the same position I did then, firing on a switch engine, I have seen Mustell and what he was doing and noticed his work around there for the two years I have been there.

Walter Law, a witness produced on behalf of the defendant, being first duly sworn, on examination testified as follows:

I was watchman at the Hillyard yards in 1913. Just previous to the accident I was going east from the depot and I went down between three and four. I saw him just before he got hurt. He and Cantley were coming back as I was going down. It was a little east of the accident and on No. 5 track, I think it was. I did not see the actual occurrence. They were coming back in kind of a hurry, walking side by side. When I heard him call out I turned around. He was lying on the ground on the north side of the No. 1 track just outside of the rail. When I first looked around the car wheels were just passing him, the first pair of trucks. I found him lying right there in the same position. About four cars had gone by.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

He could get around pretty good. He was a pretty active man.

Testimony of THOMAS STEINHOUSE.

Thomas Steinhouse, recalled on behalf of the defendant, testified as follows :

I have been switchman and switch foreman in the yard service for nearly five years. When the cars come in they are set on certain tracks. The car men examine the train first. In the meantime the car checker gets a list. He goes down and marks the train. He marks the destination of each of the cars and marks them with chalk. After he gets through with them the field man lets the air out of the brakes. The foreman goes down and makes a cut wherever he thinks he has got enough cars to handle with safety and handily. He then pulls it over the switches on the lead and examines the cars and the marks while he is pulling them up or before he pulls up, and when he gets over the switch he designates which switch he wants thrown, by signs one, two, three or four or whatever it is. He puts his hand out with so many fingers raised, agreeing with the number of the switch. After he shows what track the cars go down the foreman cuts off the car designated for that track. The field man throws the switch. The ones that are cut off are generally kicked in on that track. If the cars have gained speed enough or are given speed enough to send them over too far, the field man is supposed to protect them by setting brakes. If the impetus was not enough to send them over the hump the cars would stop of their own accord when the momentum dies out. If they intended to throw cars against those cars the field man would naturally set one or two or three brakes. If there is no intention to throw other cars against them

Testimony of THOMAS STEINHOUSE.

the cars west of the hump would be allowed to stand there until they required to use them. There were four switch engines working directly in the Hillyard yard at that time.

I was the switch foreman in charge of this particular movement. We had put ten cars in on No. 1 track, and the field man, Mr. Miller, set three brakes, enough to hold the cars in far enough so we could project some more against them. We went back and got some more and pulled up and started to back in on one, and field man Miller was on the ground to make the coupling. We shoved against those cars that were in there and they didn't couple the first impact and we still kept going back to make the coupling. When the coupling was made I gave a sign for the engineer to push the cars and at the same time gave a sign to the field man to make the cut. The cut was made immediately after the coupling was made. Immediately I gave the sign to push the cars, at the same time giving the sign for the man following me to cut the cars off, and just at that instant I saw this man Mustell fall. The cars had already got started at that time and I immediately gave the sign to the engineer to stop and he stopped. I had no knowledge that Mustell was at the end of these cars.

Q. I will ask you whether or not that movement, as far as shoving the cars in and coupling them and cutting them off is concerned—practically the whole movement up to the time you have the stop signal on account of this accident to Mustell, was an unusual movement in the yards or not.

A. No sir; that is practically routine.

Testimony of THOMAS STEINHOUSE.

Q. Had that been done at any time before that?

A. Yes.

Q. How often?

A. Oh, I could not give the exact number of times; it is continually done all day long.

It was not customary to send a man down to the far end of the string of cars after the coupling was made for the movement that we were going to make at that time.

The purpose of the movement we were making in there was to make room for some other cars on No. 1 track. We expected to get those cars off the train that we had made the previous cut off. My idea was to get the cars for a designated point on one track, and after getting them on that track to push them in far enough to clear the lead so we could have a view of the other tracks. In order to clear the lead it would have to be at least three car lengths from the point of the switch, I did not know how many cars we were going to put in there. If the movement was not to go over the hump, the practice was to put one or two or three brakes on, sufficient to hold the cars while we projected others against them, to insure coupling. If we were not going to throw any more cars in there we would leave them standing. Three brakes would hold them on the level.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

This was a usual movement that was carried on this day, both as to extent and force of the movement, no difference in either, not a bit. Just at the time the coupling was made on this standing string of cars I gave

Testimony of HENRY CANTLEY.

the engineer the sign to back up. I gave him a sign. The cut was made immediately after the coupling was made. I gave him a sign to cut off and a sign to shove at the same time. The engine was cut off immediately after the coupling was made and the cars continued on and the engine surely shoved that string of cars. The engine was the cause of the cars moving. The cars were tied down because they were approaching the top of the incline.

Henry Cantley, recalled as a witness on behalf of the defendant, testified as follows:

I will be 20 years old next month. I started to work for the Company April 28, 1909, at the Hillyard store. There were no cars that I noticed between that end of the string that hit Mustell and the switch down at the east end. Mustell that day had been instructing me about the manner of checking cars and about things in general. He had been with me a couple of days instructing me. He said for me to be careful. I had a habit of climbing around on the cars, I was new at the work, and he told me to be careful about it, that they were liable to switch there most any time and kick a bunch of cars in there and I would get hurt at it. That was that day. The accident occurred shortly after noon.

Whereupon the following proceedings were had:

It was agreed between counsel that the accident occurred about two o'clock.

Whereupon the examination of the witness was continued, and he testified as follows:

I had observed switching before around in those yards in a general way.

Testimony of HENRY CANTLEY.

Q. I will ask you whether or not there was any difference in the movement of that car at that time than other movements in the yards previous to that.

A. Not that I know of, in particular.

During the period I was with Mustell switch engines were moving around all over the yards without notice or warning to him.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

Q. Now, Mr. Cantley, you say sometimes you saw men on the end of the cars when they were being shoved down?

A. Yes, sir.

Q. And when they were being kicked down?

A. I don't know—

Q. You don't know what the movements were?

A. No, I don't.

Q. What kind of business were you in before you went with Mustell to learn the car-checking business?

A. I was material clerk in the store department.

Q. And you had no knowledge about anything about the yards, had you?

A. No, sir.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

Q. When you climbed up on the cars Mustell told you you must not do it because they were liable to switch those cars and you were liable to get hurt?

A. Yes, sir.

Q. On this particular occasion, you being right behind Mustell as you have heretofore described and a

Testimony of HENRY CANTLEY.

considerable distance from where he was, you just barely had time to get out of the way so the car would not hit you, didn't you?

A. Yes, sir.

Q. On account of the quickness with which it moved?

A. Yes, sir.

Q. You didn't see anything to indicate that any car was coming against that string of cars, did you?

A. No, sir.

I just glanced up in a casual manner and saw the way the smoke was going straight up. I didn't have the purpose in mind of seeing if there was any danger. As I said before you can't tell when the cars are going to move.

Q. As a matter of fact, when you didn't see anybody on top of that car and did not see any man on the ground and did not see any indication of any cars coming you thought you were perfectly safe in crossing there at that time.

A. Not any more than—

Q. (Interrupting) Well, you thought you were perfectly safe.

A. We certainly would not have tried to cross if we thought there was danger there.

Whereupon, upon redirect examination, he testified as follows:

Q. You started to say "Not any more than—"

A. Not any more than going around any other car.

Q. With reference to kicking this car down there, Mr. Cantley, you said it kicked very quickly. Now I

Testimony of THOMAS D. FARMER.

want to ask you how that compared with the kicking of other cars that you had observed in the yards there.

A. Well, as a general observation, I did not see anything different.

Whereupon, upon re-cross examination, he testified as follows:

Q. You do not know how far it went through, do you?

A. No, sir.

Thomas D. Farmer, recalled as a witness on behalf of the defendant upon examination by Mr. Albert testified as follows:

The switch we were making at the time of the accident was a shove. The first I knew of the accident after I cut the cars off, I looked up and saw Mr. Mustell lying on the ground.

Q. Was there any sudden jerk or smash of the engine there?

A. Not that I know of.

Q. How did cars move in the yards there during your experience while you were a switchman there, with reference to giving warnings or notice that movements were about to take place, any movements similar to this?

A. Well, there was no warning that I know of, only—there was no warning from the men, the men that was working around the cars had to look out for themselves.

MR. PLUMMER: That last part I move to strike out, if your honor pleases. He asked him with reference

Testimony of A. THOMAS.

to warnings and then he said that they had to look out for themselves. That is not responsive.

THE COURT: That is a conclusion, I think.

Q. With reference to the men who were working on the switching tracks, outside of the repair tracks, was it customary or usual, in movements similar to this, to give warnings to them?

A. No sir.

Whereupon, upon cross examination by Mr. Plummer he testified as follows:

Q. You made a statement also to the claim agent right after this thing happened, didn't you?

Q. And you testified when this case was partly tried in the superior court, didn't you?

A. Yes, sir.

Q. And during the trial of that case, although you were subpoenaed as a witness by us, and were over there to testify on behalf of the plaintiff, after giving us this written statement, you were in constant communication with Mr. Albert and Mr. Ryan of the railroad company, weren't you?

A. I was, yes, sir; I was subpoenaed by them.

Q. How is that?

A. I was subpoenaed by Mr. Albert.

Q. After I subpoenaed you?

A. Well, I don't know whether it was after or—yes, it was after you subpoenaed me.

A. Thomas a witness produced on behalf of the defendant, being first duly sworn, was examined by Mr. Albert and testified as follows:

Testimony of A. THOMAS.

I am a car repairer, I have been with the Company about 16 years. I remember the accident that happened to Mr. Mustell. I was in the yard that day inspecting on track 5. Mr. Mustell was in the yards every day at most all hours, different times. Whenever a train came in he was in the yards checking up, marking cars. I saw Mr. Mustell just before the car struck him. I did not see the car hit him but he was very close to the car the last I see of him. He was coming up through the yard and went to cross over from track five, over towards the main line. He and Mr. Cantley came up through the yards, apparently not paying a great deal of attention to where they were going or anything. Mustell was just walking across the yards. I saw him just about the time he got to the track these cars were standing on. He started to cross. I couldn't say whether he looked up or looked around. I did not see him look up. The cars were moved but I didn't notice just how hard or how fast they were moving; that is, they were kicked in.

Q. What I mean is whether or not you observed this movement so you could tell whether it was similar or different from movements that had occurred in the yards at other times prior to that?

A. Nothing more than the movements as made daily there. I could not see any difference.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

Q. That was a similar kind of a kick movement you had seen made before, was it?

A. The same movement.

Testimony of W. F. KIPPLE.

I don't know whether it would be a kick or a shove. I don't know which it was, the cars were moving. I would not term it a kick switch. I saw Mustell when I was over on five. I was right in there somewheres, pretty near straight across from where the accident occurred.

Whereupon the following proceedings were had:

The point where he was standing was marked X.

Whereupon the examination of the witness was continued and he testified as follows:

I was inspecting a train that just came in. I inspected the train by looking it over and if I find a car in bad order you put a bad order tag on it and set it out and it is kicked over or shoved over to the rip track to be repaired. I was doing that at the time. I was looking at the equipment, the wheels and gear. I was on the north side of the track, the west side we call it there, on the side towards Hillyard. You have to look south in order to examine the equipment. I seen someone with Mr. Mustell, and I looked across to see who it was. I didn't know it was Mr. Cantley, at the time.

Q. Didn't make any note of how far he was from the car, or anything about it did you.

A. Well, he was crossing—Well, I started to say that he was starting , started to cross pretty close to the car. When we are working in the yards and see anyone close to the cars we generally notice it.

W. F. Kipple, a witness produced on behalf of the defendant, being first duly sworn, testified as follows, upon examination by Mr. Albert:

Testimony of LESLIE ANDERSON.

I am a switchman, at Vancouver. I was car checker at Hillyard. I broke Mr. Mustell in as car checker and I instructed him in the duties of that position such as checking cars, marking cars, getting seals, mark trains, mark the location of tracks, line trains. I have told him all about different dangers such as approaching trains, switch engines, crossing over tracks or under cars or through cars and things of that kind. I told him to go down by the lead and then cross over because he would not make any time and that has always been my experience as long as I was there. I told him about movements on the the tracks; you always expect switch engines working at both ends, you could always expect trains moving at any moment and always keep clear of them.

Whereupon, upon cross examination, he testified as follows:

I have been brought over from Vancouver to testify in this case. There was no one else present when I told Mr. Mustell of these dangers about moving cars, and he is dead.

Leslie Anderson, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

I am 21 years old. I am yardmaster's clerk at Hillyard. I have been in the service 7 years. I have worked from call boy up, yard clerk, car checker and manifest clerk, weigh master, both day and nights and yard master's clerk. I did not see the accident. I have heard the testimony relating to the movement of the trains and so forth. I was with Mustell several times prior to

Testimony of LESLIE ANDERSON.

the accident, when movements similar to this occurred, similar to the movement which occurred just previous to the time of his death. It occurred frequently in the yards.

Q. Did they move them without them, without those signals or warnings or bells?

A. Well, in some cases, yes. Take it around the noon hour, and any time when the men are going to and from the shops, the bell is always rung, when there is men crossing on the track.

Q. That is at what point.

A. Right there in front of the yard offices, in front of the depot, a little ways, there is a crossing where most of the men cross.

Q. That is up at the extreme west of the map there?

A. Yes, sir.

Q. What about down in the vicinity of this accident?

A. Well, they never ring the bell down there. There is hardly any men crossing there, that is down in the yard there.

On cross examination by Mr. Plummer he testified as follows:

Q. Don't you know, sir, that men from these shops and these different buildings there, that are working there during the noon hour, when going to their meals, when switching is going on, that they cross down by that place, by the ice house, over to Hillyard, and through this opening here and these other openings, and all through the yard?

A. Not very many of them do.

Q. Well some of them do?

Testimony of LESLIE ANDERSON.

A. Not very many.

Q. Well some of them do?

A. One or two.

Q. You have stood there and counted them each time?

A. I have been down there several times, yes sir.

Q. And every time they go to or from their lunch, or home at night, or to work in the morning, you say that only one or two pass there?

A. Not any more than that.

Q. And there are none pass through here (indicating).

A. No sir, there is a hard place to get through there.

Q. How many pass through here? A. None.

Q. And how many pass through here (indicating).

A. A few.

Q. As a matter of fact, they pass all around there and you did not pay any attention to it?

A. Yes sir, I paid attention to it all the time.

Q. Why did you pay attention to it?

A. Simply because I did.

MR. ALBERT: I object to that; that is not within the issues.

MR. PLUMMER: See what he knows about this.

Q. Why did you pay attention to it?

A. Well, I didn't have much of anything else to do, and simply noticed it. I have been out there many times.

Q. But you are yardmaster's clerk, are you?

A. Yes, sir.

Testimony of WILLIAM BOND.

Q. Don't you have anything to do?

A. Yes sir, duties in the office and out in the yard both.

Q. And during these different times, during the noon hour, and the night hour, and the morning hour, you have noticed just how many men go around different places to get to Hillyard?

A. I have at different times, yes, sir.

I didn't see the movement that killed Mustell. I know how that movement was made from the testimony. I was on the ground a minute and a half or so after it happened.

William Bond, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

I am assistant yardmaster in Spokane at the present time. At the time of the accident I was Assistant Yardmaster in Hillyard. I have had 20 years' experience in switching, on the S. F. & N., the Great Northern, the Northern Pacific and the O. W. R. & N. I am acquainted with the methods of switching on all these roads. The day of the accident I was standing on the platform right at the depot. I saw the switching movement that occurred there. They had a bunch of cars on One and pulled up with another bunch over the switch, and shoved down and coupled on and started them back and cut them off. I saw the speed with which that movement was made. It was not very fast; just enough to move the cars a little bit. It don't take much to move them three or four car lengths there, it is level. I have had an acquaintance with the movements in the Hillyard yards ever since 1902. That

Testimony of WILLIAM BOND.

movement is a movement that is liable to happen on any track there any day and it is happening every day. It happened pretty close to two o'clock. It was day light. The cars that were standing there were empty. They were on track One and they were switching a train and getting the city loads out to Spokane.

Whereupon the following proceedings were had:

MR. PLUMMER: We admit Mustell's familiarity with movements of trains in the yard there, because we have said he knew the custom and relied on it. He knew the custom as it actually existed.

Whereupon the examination of the witness was continued:

Q. I will ask you with reference to the frequency during this time, previous to his death, of cars moving backward and forward there, without any warning of any kind?

A. It happens all the time, every day.

Q. Supposing in these yards, Mr. Bond, it would be necessary to put a man on each and every one of these cars that were moved in there, what would be the result of that business?

MR. PLUMMER: Just a moment, if your honor please. There is no claim here that it was necessary to put a man on each one of those strings of cars, or each car by itself.

THE COURT: There is nothing involved here except the mere question of custom, they say.

MR. ALBERT: All right, as long as we know that, I will be glad to cut it out, on that understanding.

Testimony of WILLIAM BOND.

MR. PLUMMER: Sure.

Thereupon the examination of the witness was continued:

I don't know just exactly when they set that first string in there. It was a short time before they made the second cut.

C. H. Gebhart, a witness produced on behalf of the defendant, was recalled, and on examination by Mr. Albert testified as follows:

I am General Yardmaster. I have been employed in connection with switching for more than 30 years. I switched in the terminals in Duluth, the Northern Pacific and the old St. Paul and Duluth. I came to the Great Northern at Larimore, North Dakota, in 1903, and have been with the Company ever since. The first time I came to Hillyard was about 10 years ago. I have been in the Hillyard yards this last time about 4 years. I did not see the accident but I did shortly after it happened. I saw the man when he fell. I was standing on the platform of the depot. I saw this train come in there. I saw the movement that occurred there.

Whereupon the following proceedings were had:

Q. What did they do?

A. There was a bunch of cars on No. 1. track.

THE COURT: To a very considerable extent there is no dispute whatever between the parties as to what happened.

MR. ALBERT: There seems to be a dispute. If they do not dispute our witnesses I certainly do not care to put on any more witnesses.

Testimony of C. H. GEBHART.

THE COURT: Every witness testified that there were eight or ten cars on there, and put some cars on after that.

MR. PLUMMER: There is no dispute about that at all and never has been.

MR. ALBERT: No dispute about that, but what happened after they went to couple up.

There was a bunch of cars in on No. 1. track and they pulled a bunch of cars off the train they were switching from to the other tracks, pulled up over No. 1 switch and back in against these cars that were on No. 1. track and there was a man down there giving them signals, giving them hand signals. When they coupled together I was talking, or Mr. Bond, rather, started to talk to me. He was standing right alongside of me and some one, I don't know who it was, gave a signal for the engineer to back up. I think it was the foreman, Mr. Steinhouse, and all of a sudden he jumped over and he swung the engineer up very violently, and I kind of stuck my head out and I said "What is the matter" and he said "We hit a man."

Q. Had you ever seen any movements like that before in the yards, previous to this time?

A. It is a common movement, an every day movement in every yard that I have ever been in.

After the train had coupled back they were going three or four miles an hour.

On cross examination by Mr. Plummer, he testified as follows:

Q. How fast was the engine going when the string of cars coupled into this standing string?

Testimony of G. F. GARVIN.

A. That is something I can not say.

Q. Approximately?

A. Just moving up there easy.

Q. Just barely moving?

A. No, after they started to back up they gave the engine some steam and they started to go back. They were going about 3 or 4 miles an hour I should think. About as fast as a man could walk, about like that. That is about the gait it would take.

G. F. Garvin, a witness produced on behalf of the defendant, being first duly sworn, on examination by Mr. Albert testified as follows:

I am in the yard service of the N. P. Have been in the yard service upwards of 20 years, for the Oregon Short line, Colorado Midland. The Butte, Anaconda and Pacific, the Northern Pacific and the Terminal Company at Superior, Wisconsin. I have lived in Spokane 17 or 18 years, running through here and working out of Spokane. I am in charge of the coach yard at the Northern Pacific. I am familiar with the yards at Hillyard. I have had occasion to go there once or twice a month for 7 or 8 years. I have seen them nearly every time I went there, performing switching service. I have heard the testimony here with reference to the way this particular switch movement occurred. I have seen them perform switch movements similar to that they have testified to here today, referring to this particular movement that happened at the time of the accident. In coupling up cars I have observed what the action is on the draw bars, on the slack and on the cars

Testimony of G. F. GARVIN.

generally when a coupling is made. Assuming that the coupling up is with the engine going three or four miles an hour—well, there is generally about two feet of slack in the springs of the cars when they are coupled together, and when the impact goes against them they naturally spring apart so it leaves, with ten cars, I should say probably 20 feet of slack in the springs.

Q. What happens to the far car when the coupling is made when that slack is taken out of it?

A. It runs away with the impact.

Q. What is the movement of the end car?

A. The end car, it starts very suddenly, the spring pressure goes up first before the car moves and then when it moves it moves suddenly.

That is the usual occurrence when you are coupling. It is practical to cut off while a shove is going on.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

I heard Mr. Gebhart's description about switching operations that were done at the time this man was killed and I answered that I had seen this kind of similar operation. I think I based that upon the facts that Gebhart testified it was only going about 3 or 3½ miles an hour.

Q. That is the usual custom isn't it?

A. About that.

Q. In other words, the custom in handling these cars is about the speed testified to by Gebhart?

A. That is generally about the speed.

Whereupon, upon re-direct examination, he testified as follows:

Testimony of G. F. GARVIN.

BY MR. ALBERT:

Q. Let us assume, Mr. Garvin, so there won't be any question about this, that they had a string of cars come in on No. 1 track, some eight or ten cars, I think it is and they backed up on a string of eight or ten cars or fifteen, I don't know just which they claim, but I will assume ten cars, with that understanding, on track 1, and they backed into that string of cars and coupled up on it with sufficient force to send that string of cars, the far string of cars, a difference of three or four car lengths as they shoved that through?

THE COURT: Four or five car lengths.

MR. ALBERT: Q. (Continuing) Four or five car lengths, and assume that the end car moved very quickly and caught the man that was passing the end car a distance of, I think in the neighborhood of three or four feet, we will say for the purpose of this question, three or four or a little more, and that there was no man put on the end of the car, the far end of the car, as a warning, and that there was no bell rung or whistle blown, or no notice or warning of any kind other than the fact that the crash of the cars was heard as they were coupled together, I will ask you whether or not you have seen, observed, movements similar to that, with the exception of the fact that the accident happened.

A. Every day.

MR. PLUMMER: Wait. That is objected to. That has to be confined to what he saw in the Hillyard yards.

MR. ALBERT: Yes, sir.

MR. PLUMMER: Yes, not in some other railroad.

Testimony of G. F. GARVIN.

A. Yes sir, I have seen that done in the Hillyard yards.

Q. More than once?

A. Yes, on several occasions.

Whereupon, upon re-cross examination, he testified as follows:

There are about 2 feet of slack in a car, if they are pushed together. In about ten cars we figure you will have 20 feet of slack.

Q. Now, if you were passing across the end of a car and you would hear the crash as the cars came into the end of the string, and immediately the head car moved very violently and very suddenly and you did not hear any continuation of the coupling, taking up of that slack, then you would say the slack was out, wouldn't you?

A. I would say the slack was up. That would be in.

Q. It would take considerable force, wouldn't it, to send those cars suddenly and violently, turn cars on that track, with that suddenness I have described, wouldn't it?

A. No.

Q. Wouldn't use much force?

A. No.

Q. Do you pretend to say that could be done, if an engine was going through at 3½ miles an hour?

A. I do.

Q. So that a man could not get out from behind it?

A. No, I would not say that. I say it moved that way, moved violently, I say, because the slack is there

Testimony of G. F. GARVIN.

and the very minute the forward car moves the hind one has got to move.

Testimony of witness closed.

MR. ALBERT: Defendant rests.

MR. PLUMMER: We rest.

Whereupon the following proceedings were had:

MR. ALBERT:

The defendant now moves the Court to direct a verdict in favor of the defendant on the ground that the evidence has not shown negligence on the part of the defendant, and the evidence does not show any cause of action in favor of the plaintiff and against the defendant under the Employers' Liability Act, or under the common law or under the statutes of the State of Washington, but the evidence shows as a matter of law that at the time and place deceased received the injuries which caused his death, that he knew the dangers of his employment, and was familiar with the movement and manner of work in the yard, and that he assumed the risk thereof. The evidence shows that the accident was caused by the negligence of the deceased, Fred G. Mustell. Further, that the negligence which is covered by the allegations of the complaint has not been shown or sustained by the evidence produced on the trial.

THE COURT:

I think I will let the case go to the jury, and you can have my ruling reviewed by the Circuit Court, or I may review it myself on application.

MR. ALBERT:

In that case that would mean a new trial. We could not get a judgment on it in that way.

MR. PLUMMER:

We will consent that if a verdict should be rendered for the plaintiff in this case, that the Court may consider the motion for a judgment non obstante, and that we will not question the right of the Court to do so. I do this so as to save the necessity for another trial, but to settle it in one trial.

THE COURT: And the same as to the Court of Appeals?

MR. PLUMMER: Yes, sir.

Defendant excepted to the ruling of the Court in refusing to direct a verdict which exception was allowed by the Court.

Whereupon the following proceedings were had:

The defendant moved the Court to withdraw and exclude from the consideration of the jury the question of negligence as to the claim that the movement in question, which resulted in the collision with Mustell, was unusual or extraordinary or a negligent movement, or any negligent handling of the cars, on the ground that there was no evidence to support such charge of negligence, which motion was denied by the Court, to which ruling denying the motion defendant excepted, which exception was allowed.

Whereupon arguments were made to the jury on behalf of the plaintiff and the defendant.

Whereupon the Court instructed the jury.

Whereupon the Court submitted to the jury two forms of verdict, one being as follows:

“We, the jury in the above entitled action, find for the plaintiff in the sum of———Dollars,” and instructed

the jury to insert the amount that they find for both plaintiffs, in proportion to the amount of the recovery, as follows: To the widow the sum of _____ Dollars; to the infant child the sum of _____ Dollars, and that these two separate amounts were to make up the amount of their general verdict.

The Court further stated to the jury that in addition to the general verdict for the plaintiff or for the defendant, that he submitted the following special interrogatory, which they should answer:

“Was the train movement which caused the death of Fred G. Mustell a “running switch,” within the intent and meaning of the rules of the defendant company,” and instructed them that they should answer that question yes or no.

Whereupon the defendant excepted to the submission by the Court of the special finding upon the question of running switches and the application of Rule 308, upon the ground that the Court should have submitted special findings upon the other grounds of negligence upon which plaintiff relied.

Thereupon the following proceedings were had:

THE COURT: I was perfectly willing to do that. I did that out of an abundance of caution. As I stated in the forenoon I am perfectly thoroughly convinced in my own mind that it was not a running switch, and I think the jury will say so, so that I think the error will be harmless.

MR. PLUMMER: It couldn't be error because all the Courts have said so.

Whereupon the Court called the jury back for the purpose of instructing them in accordance with the admis-

sion of the counsel for plaintiff that they should not consider the question of pain and suffering.

MR. ALBERT: If the Court is going to bring the jury back, then I shall ask the Court to submit to the jury special findings with reference to the other three grounds of negligence.

THE COURT: You may prepare them and submit them.

Whereupon the jury were called back and charged with reference to the admission that no claim was made for pain and suffering and that they must omit that from their deliberations. The Court stated that he would submit some other questions to be answered by the jury in connection with their other general verdict.

Whereupon the following proceedings were had:

It was agreed between counsel for the respective parties that the form of the special questions to be submitted to the jury should be as follows:

(2) Was it the custom of the defendant to place a man on the head car (when moved), in the manner the car in question did move and did Mustell rely on that custom? Answer——

(3) Were the cars which struck Mustell moved in a manner extraordinary or unusual? Answer——

(4) Was the defendant negligent in failing to provide a rule for the warning of employes such as Mustell? Answer——

(5) Did Mustell assume the risk? Answer——

(6) Was the negligence of Mustell the sole cause of his death? Answer——

Whereupon counsel for the plaintiff stated that he had no objection to submitting these special findings.

Counsel for the defendant stated that he desired to renew his objection to the submission of special findings to the jury after the case was argued; that it was the position of the defendant that no special findings at all should have been submitted to the jury after the argument, without notice to counsel for the respective parties, and that if the Court was going to submit any findings to the jury, then that all the questions should be submitted for their consideration.

Thereupon the jury having received the charge of the Court, and having retired to consider their verdict and special findings, returned into open Court with a verdict in favor of the plaintiff for damages in the sum of \$5750, and apportioned the amount of the recovery to the widow Grace Mustell the sum of \$3450, to the infant child, Ruth Mustell the sum of \$2300, and did find specially with reference to the question submitted to such jury for their special findings as follows:

(1) Was the train movement which caused the death of Fred G. Mustell a "running switch," within the intent and meaning of the rules of the defendant company.

Answer: No.

(2) Was it the custom of the defendant to place a man on the head car when moved in the manner the car in question did move, and did Mustell rely on this custom?

Answer: No.

(3) Were the cars which struck Mustell moved in a manner extraordinary or unusual?

Answer: Yes.

(4) Was the defendant negligent in failing to pro-

vide a rule for the warning of employes such as Mustell?

Answer: No.

(5) Did Mustell assume the risk?

Answer: No unusual risk.

(6) Was the negligence of Mustell the sole cause of his death?

Answer: No.

DEFENDANT'S EXHIBIT 4.

My name is Thomas Farmer. I am now a resident of 310 Sanson Ave., Hillyard, Wash. Am now starting an automobile garage at Reardon, Wash. I was employed by the Great Northern as fireman, brakeman and switchman from Jan. 23, 1910 to Sept. 29, 1913. I was employed as switchman for Great Northern at Hillyard on Sept. 29, 1913. Tom Steinhouse was switch foreman, Louis Picton, Engineer. I was following the engine and Miller was fireman. At about 2:30 o'clock P. M. picked up about 8 or 10 cars, do not remember whether load or empties and started to back them in on Track No. 1. There were about 15 other cars standing on Track No. 1. I do not remember whether I threw switch or whether Steinhouse threw it. Just before cars taken in by us reached cars standing on Track 1, Foreman Steinhouse ordered me to cut cars off and I did so and cars struck the cars standing on No. 1, pumping them back about 4 or 5 car lengths. After I cut the cars off I looked up and saw Fred Mustell lying on right hand side west of track on ground. I did not go over to body which was about 15 cars or more away from me. I hurried to depot to get a stretcher. At time of accident there was no employe or any person on top of

any of the cars, nor before going in nor while going in was the bell rung or whistle blown. Steinhouse was near the depot a few feet at time of accident but right at my side at time he ordered pin pulled. The only signal I heard given was the whistle of another engine which was given after we struck Mustell. We were engaged in switching a train of cars that had just come in. Gephart, yardmaster, was standing talking to Steinhouse at time of accident, I think. I did not go over to body at all. It was later brought to depot. I left the service of the company next day. I was running extra and regular man took my place.

I called at office of Plummer & Lavin, Feby. 21, 1913, in response to letter addressed to me at Reardon, Wash. They told me they wanted nothing but the facts as I saw and knew and nothing but the truth. I have read the statement and it is true and correct and no promise was or is made to me for giving this statement. It is true and correct statement of the facts as I now remember them. I am not acquainted with Mrs. Mustell and have no interest in this case. At numerous times before his death I saw Mustell going through the yard checking cars, weighing cars, taking numbers, seals, records and marking cars.

(Signed) Thomas D. Farmer.

Whereupon the following proceedings were had:

Upon the 29th day of September, 1914, defendant herein served and filed its motion for judgment notwithstanding the verdict, in words as follows:

Now comes the defendant above named, and moves this Court for an order, vacating and setting aside the verdict rendered in said action on the 22nd day of Sept-

ember, 1914, in favor of the plaintiff, and for judgment in favor of the defendant notwithstanding such verdict, upon the following grounds:

1. That neither the evidence nor the testimony shows or tends to show, either directly or indirectly, that the defendant or anyone for whom it was responsible, was guilty of any negligence, but on the contrary conclusively shows that the defendant exercised all the duties imposed upon it by law, and that said defendant used the care required to furnish the plaintiff's intestate a reasonable safe place in which to work.

2. That no cause of action against the defendant, in favor of the plaintiff has been proven.

3. That no cause of action against the defendant has been proven under the Act of Congress relating to the liability of common carriers by railroad to their employes in certain cases, approved April 22nd, 1908, as amended April 5, 1910, known as the Federal Employer's Liability Act.

4. That the evidence and testimony adduced on the part of the plaintiff and also that adduced on the whole case, shows, as a matter of law, that the plaintiff's intestate assumed the risks and dangers to which he was exposed, if any, and that it was part of the consideration of his employment and part of his duty under such employment to assume such risks and dangers, if any there were which directly or indirectly brought about the accident sued upon.

5. That the evidence and testimony shows that the said plaintiff's intestate knew of the danger which caused his injuries, which evidence and testimony conclusively shows, as a matter of law, that plaintiff is not entitled

to a verdict herein, but that the said defendant is and was entitled to a verdict, and is entitled to judgment against the plaintiff.

6. That the evidence does not show that the defendant negligently or carelessly moved the car which came in collision with plaintiff's intestate violently, or with unnecessary violence, or that said movement was unnecessary, or that the violence or manner in which the same was moved was of an extraordinary character or was an unusual manner, or that the collision between said car and said Mustell was caused by reason of negligence or carelessness on the part of the switching crew in handling the switching operations at the time and place when said collision occurred, or that said car was moved without reasonable care by the said defendant.

7. That the jury having found specially with reference to the other particulars alleged in said complaint of negligence on the part of said defendant, and there being no evidence in support of the charge of negligence referred to in the last ground of this motion, no cause of action against the said defendant has been proven or shown herein.

8. That the evidence is insufficient to sustain a verdict for the plaintiff, upon the ground that the evidence and findings of the jury show that upon all other grounds alleged in the complaint, except upon the ground mentioned in Paragraph 6, that the defendant was not negligent and that with reference to such ground the evidence conclusively shows not only that the said car was not moved in a careless, negligent, unusual or extraordinary manner, but does show that said car was moved in the ordinary and usual manner of moving such cars.

This defendant in making this motion for judgment notwithstanding the verdict expressly waives any and all right to a new trial or another trial in this action and makes no motion therefore, and requests that no new trial of said action be granted, but, on the contrary, said defendant makes this motion to vacate and set aside the verdict in favor of the plaintiff and for judgment in favor of the defendant notwithstanding such verdict.

Said motion is based upon the findings and papers on file, upon the minutes of the Court, including not only the clerk's minutes and any notes and memorandum which may have been kept by the judge of this Court in the trial thereof, but also the reporter's transcript of his shorthand notes of said trial.

Dated at Spokane this 29th day of September, 1914.

CHARLES S. ALBERT,
THOMAS BALMER,

Attorneys for Defendant.

Whereupon, upon the 30th day of September, 1914, said motion for judgment notwithstanding the verdict was taken up for hearing by consent of counsel, and said motion was presented to the Court.

Whereupon said Court made its order denying said motion for judgment notwithstanding the verdict, which order is as follows:

This cause coming on to be heard upon defendant's motion for judgment notwithstanding the verdict of the jury, the above named defendant appearing by Chas. S. Albert and Thomas Balmer, its attorneys of record, urging said motion, and the above named plaintiff appearing by Plummer & Lavin, her attorneys, resisting said

motion, and after hearing said motion but no argument thereon, and the Court being fully advised in the premises, it is

ORDERED, that said motion be, and the same is hereby denied, to which ruling defendant excepts and its exception is allowed.

Done in open Court this 1st day of October, 1914.

FRANK H. RUDKIN,
Judge.

Whereupon the said defendant did except to the making of said order, denying said motion for judgment notwithstanding the verdict, which exception was allowed by the Court.

Whereupon on the 2nd day of October, 1914, judgment was entered in favor of the plaintiff and against the defendant, in the following language:

This cause heretofore coming on to be heard in open Court before the Court and a jury, and after the parties had concluded their testimony the Court instructed the jury and the jury retired to deliberate upon their verdict, and thereafter said jury appeared in Court and reported a verdict in favor of the plaintiff and against the defendant in the sum of five thousand seven hundred and fifty dollars (\$5750):

NOW THEREFORE, upon the verdict of said jury and the evidence adduced and the law of the case, and the Court being duly advised in the premises, it is

ORDERED AND ADJUDGED, that plaintiff, Grace Mustell, as administratrix of the estate of Fred G. Mustell do have and recover of and from the above named defendant, the Great Northern Railway Company, the

sum of five thousand seven hundred and fifty dollars (\$5750) and costs and disbursements herein taxed at One Hundred Sixteen and 10-100 Dollars.

Done in open Court this 2nd day of October, 1914.

FRANK H. RUDKIN,
Judge.

Whereupon the defendant excepted to the rendering and entering of the judgment in the above entitled action, ordering and adjudging that the plaintiff herein have and recover from the defendant the sum of five thousand seven hundred and fifty dollars (\$5750), together with costs, dated and entered on the 2nd day of October, 1914, and to said judgment, which exception was allowed by the Court.

Now in the furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and prays that the same may be cited, signed and certified by the judge, as provided by law, and filed as a bill of exception.

CHARLES S. ALEBRT,
THOMAS BALMER,
Attorneys for Defendant.

Due service of the within Bill of Exception by a true copy thereof is hereby admitted at Spokane, Washington, this 29th day of Sept., A. D., 1914.

PLUMMER & LAVIN,
Attorneys for Plaintiff.

(Title of Court and Cause).

Order Settling Bill of Exceptions.

Now, on this 8th day of October, 1914, the above cause coming on for hearing on the application of the

defendant to settle the bill of exceptions in said cause; defendant appearing by Charles S. Albert and Thomas Balmer, its attorneys, and the plaintiff appearing by Messrs. Plummer & Lavin, her attorneys, and it appearing to the Court that the defendant's proposed bill of exceptions was duly served on the attorneys for the plaintiff within the time provided by law, and that amendments have been suggested thereto by the plaintiff, and that the time for settling said bill of exceptions has not expired, and the Court having duly allowed said proposed bill of exceptions and the amendments thereto; and it further appearing to the Court that said bill of exceptions contains all the material facts occurring in the trial of said cause, together with exceptions thereto, and all the material matters and things occurring upon the trial, except Exhibit 2 introduced in evidence, which is hereby made a part of said bill of exceptions and the clerk of this Court is hereby ordered and instructed to attach the same thereto;

Therefore, upon motion of Charles S. Albert, attorney for the defendant.

IT IS HEREBY ORDERED, that said proposed bill of exceptions, with the amendments allowed by this court, be, and the same is hereby settled as a true bill of exceptions in said cause, and that the same is hereby certified accordingly by the undersigned, judge of this Court, who presided at the trial of said cause, that it conforms to the truth and that it is in proper form, and that it is a full, true and correct bill of exceptions, and the clerk of this Court is hereby ordered to file the same as a re-

cord in said cause, and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

(Signed) FRANK H. RUDKIN,
District Judge.

Endorsements: Bill of Exception.

Received at Clerk's office September 29, 1914, and filed, after being settled and certified to by the Court, October 8, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Assignments of Errors.

Comes now the defendant, and files the following assignment of errors; upon which it will rely upon its prosecution of the writ of error in the above entitled cause from the judgment made by this Honorable Court upon the 2nd day of October, 1914 in the above entitled cause.

I.

That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in denying the motion of the defendant to direct a verdict in favor of the defendant, made at the close of all the evidence in the case, for the following reasons:

1. That the evidence did not show any negligence on the part of the defendant.
2. That the evidence did not show any cause of action in favor of the plaintiff and against the defendant, under the Federal Employer's Liability Act.
3. That the evidence did not show any cause of

action in favor of the plaintiff under the common law, or under the statutes of the State of Washington.

4. That the evidence showed, as a matter of law, that at the time and place the deceased received the injuries which caused his death, he knew the dangers of his employment, was familiar with the movement and manner of work in the yards, and that he assumed the risk thereof.

5. That the evidence showed that the accident was caused by the negligence of said Fred G. Mustell.

6. That the negligence alleged in the complaint was not shown to have been sustained by the evidence produced on the trial.

II.

That the Court erred in denying defendant's motion for judgment notwithstanding the verdict, upon the following grounds:

1. That the evidence did not show any negligence on the part of the defendant.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the defendant, under the Federal Employer's Liability Act.

3. That the evidence did not show any cause of action in favor of the plaintiff under the common law, or under the statutes of the State of Washington.

4. That the evidence showed, as a matter of law, that at the time and place the deceased received the injuries which caused his death, he knew the dangers of his employment, was familiar with the movement and manner of work in the yards, and that he assumed the risk thereof.

5. That the evidence showed that the accident was caused by the negligence of said Fred G. Mustell.

6. That the negligence alleged in the complaint was not shown to have been sustained by the evidence produced on the trial.

III.

That the Court erred in ordering judgment to be entered in said action, in favor of the plaintiff and against the defendant.

IV.

That the Court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant.

WHEREFORE, the said Great Northern Railway Company, plaintiff in error, prays that the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, be reversed, and that said District Court be directed to enter judgment in said action in favor of said defendant.

(Signed) CHARLES S. ALBERT,

(Signed) THOMAS BALMER,

Attorneys for Plaintiff in Error, Defendant in the Lower Court.

Due service of the within assignment of errors by true copy thereof, is hereby admitted at Spokane, Washington, this 3d day of October, A. D., 1914.

(Signed) PLUMMER & LAVIN,

Attorneys for Plaintiff.

Endorsements: Assignment of Errors.

Filed October 3, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Petition for Order allowing writ of Error.

Defendant in the above entitled cause feeling itself aggrieved by the rulings of the Court and the judgment entered on the 2nd day of October, 1914, complains in the record and proceedings had in said cause and also of the rendition of the judgment in the above entitled cause in said United States District Court, against said defendant on the 2nd day of October, that manifest error hath happened to the great damage of said defendant, petitions said Court for an order allowing the said defendant to prosecute a writ of error to the Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided and also that an order be made fixing the amount of the security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated this 3rd day of October, A. D., 1914.

(Signed) CHARLES S. ALBERT,

(Signed) THOMAS BALMER,

Attorneys for Defendant.

Due service of the within petition by a true copy thereof, is hereby admitted at Spokane, Washington, this 3d day of October, 1914.

(Signed) PLUMMER & LAVIN,

Attorneys for Plaintiff.

Endorsements: Petition for Writ of Error.

Filed October 3, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

At a stated term, to-wit, the September Term, A. D. 1914, of the District Court of the United States of America of the Ninth Judicial Circuit, in and for the Eastern District of Washington, Northern Division, held at the Court Room in the City of Spokane, Washington, on the 3rd day of October, A. D. 1914.

Present Hon. Frank H. Rudkin, District Judge.

(Title of Court and Cause).

Order Allowing Writ of Error.

Upon motion of Charles S. Albert and Thomas Balmer, Esqs., attorneys for defendant, and upon filing a petition for writ of error and an assignment of errors:

IT IS ORDERED, that a writ of error be, and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at the sum of twelve thousand dollars (\$12,000), which said bond may be executed by said defendant as principal, by its attorneys herein, and by such surety or sureties as shall be approved by this Court, and which shall operate as a supersedeas bond, and a stay of execution is hereby granted, pending the determination of such writ of error.

(Signed) FRANK H. RUDKIN,
District Judge.

Service of the within Order by a true copy thereof, is hereby admitted at Spokane, Washington, this 3d day of October, A. D. 1914.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

Endorsements: Order Allowing Writ of Error.
Filed October 3, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Order Allowing Bond.

Defendant, Great Northern Railway Company, having this day filed its petition for a writ of error from the rulings, decisions and judgment made and entered in said action to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which it should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Circuit, and said petition having been this day duly allowed;

NOW THEREFORE, IT IS ORDERED, that upon the said defendant, Great Northern Railway Company, filing with the clerk of this Court a good and sufficient bond in the sum of Twelve Thousand Dollars (\$12,000), to the effect that if the said Great Northern Railway Company, plaintiff in error, shall prosecute said writ of

error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and viture, the said bond to be approved by the Court; that all further proceedings in this Court be and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated this 3rd day of October, 1914.

(Signed) FRANK H. RUDKIN,
District Judge.

Due service of the within order by a true copy thereof, is hereby admitted at Spokane, Washington, this 3d day of October, 1914.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

Endorsements: Order Allowing Bond on Writ of Error.

Filed October 3, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

Writ of Error—(Lodged Copy).

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you at the September 1914 term thereof, between Grace Mustell, an Administratrix of the Estate of Fred G. Mustell, deceased, and as the personal representative of said Fred G. Mustell, deceased,

for and on behalf of Grace Mustell and Ruth Mustell, the widow and minor child, respectively, of said Fred G. Mustell, deceased, plaintiff, and the Great Northern Railway Company, defendant, a manifest error hath happened, to the great damage of the said Great Northern Railway Company, plaintiff in error, as by its complaint appears;

We being willing, that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, on the 1st day of November next, in the said Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to Correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States of America, this 3d day of October, 1914, of the Independence of the United States the one hundred thirty-ninth year.

(Seal) (Signed) W. H. HARE,

Clerk of the District Court for the Eastern District of Washington, Northern Division.

Allowed by

(Signed) FRANK H. RUDKIN,
District Judge.

Service of the within writ of error and receipt of copy thereof is hereby admitted this 3d day of October, 1914.

(Signed) PLUMMER & LAVIN,
Attorneys for Defendant in Error.

Endorsements: Writ of Error—(Lodged Copy).
Filed October 3, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Great Northern Railway Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto Grace Mustell, as Administratrix of the Estate of Fred G. Mustell, deceased, in the full and just sum of twelve thousand dollars (\$12,000), to be paid to the said Grace Mustell as Administratrix of the Estate of Fred G. Mustell, deceased, for which payment well and truly to be made, we bind ourselves, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 3rd day of October, 1914.

WHEREAS, lately at the September Term, A. D. 1914 of the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said Court between Grace Mustell, as Administratrix of the Estate of Fred G. Mustell, de-

ceased, and as the personal representative of said Fred G. Mustell deceased, for and behalf of Grace Mustell and Ruth Mustell, the widow and minor child, respectively, of said Fred G. Mustell, deceased, plaintiff, and the Great Northern Railway Company, defendant, a final judgment was rendered against the said defendant, and the said defendant Great Northern Railway Company, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said Grace Mustell, as Administratrix of the Estate of Fred G. Mustell, deceased, and as the personal representative of said Fred G. Mustell, deceased, for and on behalf of Grace Mustell and Ruth Mustell, the widow and minor child, respectively, of said Fred G. Mustell, deceased, is about to be issued, citing and admonishing her to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such, that if the said Great Northern Railway Company shall prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

(Signed) GREAT NORTHERN RAILWAY COMPANY,

By CHARLES S. ALBERT & THOMAS BALMER,

Its Attorneys.

(Signed) NATIONAL SURETY COMPANY,
 By JAMES A. BROWN,
 Resident Vice President.
 F. L. JONES,
 Resident Assistant Sec'y.

Plaintiff is satisfied with the within bond and the surety thereon.

 Attorneys for Plaintiff.

The foregoing bond is approved as to form, amount and sufficiency of surety this 3d day of October, 1914.

(Signed) FRANK H. RUDKIN,
 Judge of the United States District Court, Eastern District of Washington, Northern Division.

Due service of the within bond by a true copy thereof is hereby admitted at Spokane, Washington, this 3d day of October, 1914.

(Signed) PLUMMER & LAVIN,
 Attorneys for Plaintiff.

Endorsements: Bond on Writ of Error.

Filed October 3, 1914.

W. H. HARE, Clerk,
 By FRANK C. NASH, Deputy.

CITATION ON WRIT OF ERROR—(Lodged Copy).

The President of the United States, to Grace Mustell, as Administratrix of the Estate of Fred G. Mustell, deceased, and to Messrs. Wm. H. Plummer and Joseph Lavin, her attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the

date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein Grace Mustell, as Administratrix of the Estate of Fred G. Mustell, deceased, and as the personal representative of said Fred G. Mustell, deceased, for and on behalf of Grace Mustell and Ruth Mustell, the widow and minor child respectively, of said Fred G. Mustell, deceased, is plaintiff and you are defendant in error and the Great Northern Railway Company is defendant and is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 3d day of October, A. D. 1914, and the Independence of the United States the one hundred thirty-ninth year.

(Seal) (Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington, Northern Division.

Attest: W. H. HARE, Clerk.

Due service of the within citation by true copy thereof is hereby admitted at Spokane, Washington, this 3d day of October, A. D. 1914.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

Endorsements: Citation—(Lodged Copy).

Filed October 3, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Praecipe.

To the Clerk of the Above Entitled Court:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error heretofore perfected and allowed to said Court, which record shall be transmitted in printed form to the Clerk of the Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following files, proceedings and papers on file:

Amended Complaint.

Answer to Amended Complaint.

Reply

Verdict and Special Findings.

Plaintiff's Motion for New Trial.

Defendant's Motion for Judgment Notwithstanding Verdict.

Order Denying Motion for New Trial.

Order Denying Motion for Judgment Notwithstanding the Verdict.

Judgment.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Bond on Writ of Error.

Order Allowing Bond.

Order Allowing Writ of Error.

Citation on Writ of Error.

Stipulation as to Making up Record.

(Signed) CHARLES S. ALBERT,

(Signed) THOMAS BALMER,

Attorneys for Plaintiff in Error.

Endorsements: Praecipe.

Filed in the U. S. District Court for the Eastern District of Washington, October 6, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Stipulation.

IT IS HEREBY STIPULATED BETWEEN the plaintiff, by her attorneys, and the defendant by its attorneys that the transcript of the record on the writ of error in the above entitled cause, shall be made up of the following papers:

Amended Complaint.

Answer to Amended Complaint.

Reply.

Verdict and Special Findings.

Plaintiff's Motion for New Trial.

Defendant's Motion for Judgment Notwithstanding the verdict.

Order Denying Motion for New Trial.

Order denying Motion for Judgment Notwithstanding the Verdict.

Judgment.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Bond on Writ of Error.

Order Allowing Bond.

Order Allowing Writ of Error.

Stipulation as to making up Record.

Dated this 6th day of October, 1914.

PLUMMER & LAVIN,

Attorneys for Defendant in Error and Plaintiff.

CHARLES S. ALBERT and THOMAS BALMER,

Attorneys for Plaintiff in Error and Defendant.

Endorsement: Stipulation.

Filed in the U. S. District Court for the Eastern District of Washington, October 6, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Stipulation.

IT IS HEREBY STIPULATED by plaintiff in error by its attorneys and by defendant in error by her attorneys, that in printing the record in the above entitled action, the clerk shall cause the following to be printed for the consideration of the Court on Appeal:

Amended Complaint.

Answer to Amended Complaint.

Reply.

Verdict and Special Findings.

Plaintiff's Motion for New Trial.

Defendant's Motion for Judgment Notwithstanding the verdict.

Order Denying Motion for New Trial.

Order denying Motion for Judgment Notwithstanding the Verdict.

Judgment.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Bond on Writ of Error.

Order Allowing Bond.

Order Allowing Writ of Error.

Stipulation as to making up Record.

IT IS FURTHER STIPULATED, that in printing the said record, there may be omitted therefrom the title of the Court and cause on all papers, excepting the first page, and that in lieu of said Court and cause there be inserted in the place and stead thereof, the following words, "Title of Court and Cause."

Dated this 6th day of October, 1914.

(Signed) CHARLES S. ALBERT,

(Signed) THOMAS BALMER,

Attorneys for Defendant and Plaintiff in Error.

(Signed) PLUMMER & LAVIN,

Attorneys for Plaintiff and Defendant in Error.

Endorsement: Stipulation as to Printing Record.

Filed in the U. S. District Court for the Eastern District of Washington, October 6, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

CLERK'S CERTIFICATE TO TRANSCRIPT OF
RECORD.

UNITED STATES OF AMERICA,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the
United States for the Eastern District of Washington,

do hereby certify the foregoing printed pages, numbered from 1 to 123, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, bill of exceptions, and other proceedings in the above and foregoing entitled cause, as is necessary to the Writ of Error therein, in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and as is stipulated for by counsel of record herein, as the same remain of record, and on file in the office of the Clerk of said District Court, and that the same which I transmit herewith constitute my return to the annexed Writ of Error lodged and filed in my office on the 3rd day of October, 1914.

I further certify that I herewith transmit plaintiff's original exhibit 2, the same being map of premises showing location of tracks, buildings, yards, etc., which original exhibit I herewith transmit pursuant to order of Court so to do.

I further certify that I hereto attach and herewith transmit the Original Citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of \$167.80, and that the same has been paid to me by Charles S. Albert and Thomas Balmer, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the City of Spokane, in the Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 26th day of October, 1914, and in the Independence

of the United States of America, the one hundred and thirty-ninth.

(Seal) (Signed) W. H. HARE,
Clerk, U. S. District Court for the Eastern District of
Washington.

No. 2509

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

GREAT NORTHERN RAILWAY
COMPANY, a Corporation,
Plaintiff in Error,

vs.

GRACE MUSTELL, as Administra-
trix of the Estate of Fred G.
Mustell, Deceased, and as the Per-
sonal Representative of Said Fred
G. Mustell, Deceased, for and on
Behalf of Grace Mustell and Ruth
Mustell, the Widow and Minor
Child, Respectively, of Said Fred
G. Mustell, Deceased,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

*Upon Writ of Error to the United States District
Court for the Eastern District of Washington,
Northern Division.*

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Plaintiff in Error.

P. O. Address: Great Northern Passenger Station,
Spokane, Spokane County, Washington.

Filed

JAN 27 1915

No. 2509

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

GREAT NORTHERN RAILWAY
COMPANY, a Corporation,
Plaintiff in Error,

vs.

GRACE MUSTELL, as Administra-
trix of the Estate of Fred G.
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sonal Representative of Said Fred
G. Mustell, Deceased, for and on
Behalf of Grace Mustell and Ruth
Mustell, the Widow and Minor
Child, Respectively, of Said Fred
G. Mustell, Deceased,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case comes before this court upon a writ of error to the District Court of the United States for the Eastern District of Washington, Northern Division, plaintiff in error being the defendant in the court below. Hon. Frank H. Rudkin, District Judge, presided over the trial.

This action was brought under a complaint alleging a cause of action under the Federal Employer's

Liability Act. It was claimed at the time of the injuries which resulted in the death of Fred G. Mustell that he was employed in and the defendant was engaged in interstate commerce; that he died on the 29th of September, 1913, by reason of injuries received in the Hillyard yards of the defendant; that he was employed as a car checker; that the yards were used for the purpose of making and breaking trains, in which yards defendant employed continuously switching engines and crews, and that at the time of the happening of the injuries, defendant had there numerous trains of cars which it was the duty of Mustell to check, and to take checking records to the yard office for defendant's use; that at the time of his injuries he had made out a record of cars upon one of the tracks and was carrying the same to the yard office, and while passing over Track 1, a line of fifteen freight cars was suddenly and violently moved upon him, knocking him down, running over him and causing the injuries which resulted in his death on the same day; that this string was coupled into by another string, to which was attached a switch engine, and was moved from two to four car lengths before it stopped.

It was alleged that it was the custom in the yards not to move such a string unless a man was placed and standing upon the front end, to protect against collision with things or persons; that Mustell knew of this custom and relied on it, and that the string was moved in violation of this custom, and without

a man on the end of the string; that the string was moved violently, quickly, unexpectedly and without warning; that Mustell was unable to escape from being run down and injured, that the movement was of extraordinary character, and not the usual manner in which cars were moved in order to accomplish the results desired by the switching crew.

Plaintiff alleged that the cars checked by Mustell contained freight destined to points without the State of Washington, and that there was no man upon the top of the cars which struck and injured him.

The complaint charged that defendant failed to provide proper rules for the purpose of warning Mustell of threatened danger, or to provide any rules in and about the switching operations; that if such rules had been provided and enforced, Mustell would not have been injured or killed. It was claimed in the complaint that the shops of the defendant were located at Hillyard; that there was a large number of men working there, who were required to cross the tracks of the defendant; and that the plaintiff's intestate was required to cross during switching operations, and that often it would be impossible to see or to determine just what cars would be liable to be moved; that it was necessary that rules be promulgated to make it the duty of switching or engine crews to give warning by whistle or bell, or by a man on the far end of the cars that the cars were being moved, and that no rules were promulgated.

Damages were claimed by the plaintiff as the personal representative of Mustell on her own behalf, and for the benefit of her daughter. (*Transcript pp.* 1-13.)

The defendant admitted that at some times and places it was engaged in interstate commerce and at other times and places in intrastate commerce; that Mustell died on September 29, 1913, of the injuries received at Hillyard; that part of his employment was that of a car checker; that trains were made up and broken in the yards at Hillyard, and that it had at all times employed continuously switching engines and crews, engaged in making up trains in these yards, and admitted that it was part of Mustell's duties to pass over and cross the tracks for the purpose of checking cars, and that immediately before his death he had been, among other things, checking cars, and while upon Track 1 he came in collision with a freight car; that this car was coupled onto a string of cars, and that the string did not move to exceed four car lengths. The allegation with reference to the custom of placing a man on the front end of the string of cars was specifically denied, as was also the allegation relating to the unusual and extraordinary character or manner in which the cars were alleged to have been moved. It was admitted that at the time of Mustell's death, the defendant's employes were engaged in switching cars in the yards; that immediately prior to his injuries and death, part of the work in which he

was engaged was that of car checker, and that he was going from one of the tracks in the yards of the defendant over and across another track, and that some of the cars which he had checked contained freight destined to points outside of the State of Washington; that at the time of Mustell's death there was no man stationed on the top of the cars which struck and injured him; that prior to his death he was conveying to the depot certain information and data, contained upon his checking list, which was obtained by him for the use of the defendant in switching and making up its trains and cars.

It was further admitted that certain shops were located in the yards, and that a number of men were employed in and about the same, and that some of the employes were required to go over and across the tracks of the defendant. Defendant specifically denied that the defendant was negligent in not providing or enforcing rules to warn Mustell, or that it was the duty of the switching crews or engine crews to warn him by whistle, bell or placing a man on the far end of the cars, and denied that the plaintiff had any cause of action against the defendant.

As a second defense, contributory negligence was alleged. As a third defense, it was alleged that Mustell knew of the dangers of his employment, appreciated them, and assumed the risks thereof.

(*Transcript* 14-19.)

The plaintiff by her reply denied the second and third defenses of the defendant. (*Transcript* 20.)

The case was tried upon September 18th, and at the conclusion of the plaintiff's testimony, a motion for non suit was made, which was denied. (*Transcript* 65.) At the conclusion of all the testimony defendant moved for a directed verdict, on the ground that no cause of action, either under the Employer's Liability Act, common law or the state statutes had been shown; that the evidence did show, as a matter of law, that at the time Mustell received the injuries which caused his death, he knew the dangers of his employment, was familiar with the movement and manner of the work in the yard, and that he assumed the risk thereof; that the accident was caused by his own negligence, and that the negligence covered by the allegations of the complaint had not been shown to have been sustained by the evidence produced upon the trial. (*Transcript* 95.)

In the discussion of this motion upon the suggestion by the court that he would let the case go to the jury, the defendant could have his ruling reviewed by the Circuit Court, or he might himself review it upon application, and objection by the defendant that that would mean a new trial and that judgment in favor of the defendant could not be gotten in that way (*Transcript* 95), plaintiff's counsel consented that if a verdict should be rendered for the plaintiff that the court might con-

sider the motion for judgment non obstante, without question; that this was done in order to save the necessity of another trial, and that the case could be settled in one trial, and it was agreed by the plaintiff's attorney that this agreement should apply to the Circuit Court of Appeals. (*Transcript 96.*)

The motion to direct a verdict was then denied and exception allowed. Whereupon the defendant moved the court to withdraw and exclude from the consideration of the jury the question of negligence as to the claim that the movement in question was unusual or extraordinary or a negligent movement, or that there was any negligent handling of the cars, on the ground that there was no evidence to support the same, which motion was denied by the court and exception allowed. (*Transcript 96.*)

The court then instructed the jury, and at the conclusion of his instructions stated that he would submit a special interrogatory as to whether the train movement which caused Mustell's death was a running switch. This was objected to by the defendant, upon the ground that the court should have submitted special findings upon the other grounds of negligence upon which plaintiff relied. (*Transcript 97.*) The jury was recalled for the purpose of charging them with reference to an admission of plaintiff's counsel that they should not consider the question of pain and suffering. Defendant's counsel then requested that if the court was going to bring the jury back that the court submit to the jury

special findings with reference to the other three grounds of negligence, and the court stated to the jury that he would submit some other questions to be answered by it in connection with the general verdict. It was agreed between counsel that the form of the special questions to be submitted to the jury should be in the language in which they were subsequently submitted. Counsel for plaintiff stated that he had no objection to submit these special findings. (*Transcript* 98.) Defendant's counsel stated that he desired to renew his objection to the submission of special findings to the jury after the case was argued; that it was the position of the defendant that no special findings at all should have been submitted to the jury after argument, without notice to the counsel for the parties, and that if the court was going to submit any findings to the jury, then that all the questions should be submitted for their consideration. (*Transcript* 99.) The questions covering the negligence charged in the complaint were then submitted to the jury, and the jury retired and returned a verdict for the plaintiff for \$5,750, apportioning to the widow \$3,450 and to the daughter \$2,300.

The questions submitted and the answers returned by the jury were as follows:

1. Was the train movement which caused the death of Fred G. Mustell a running switch, within the intent and meaning of the rules of the defendant company? Answer: No.

2. Was it the custom of the defendant to place a man on the head car when moved in the manner the car in question did move, and did Mustell rely on this custom? Answer: No.

3. Were the cars which struck Mustell moved in a manner extraordinary or unusual? Answer: Yes.

4. Was the defendant negligent in failing to provide a rule for the warning of employes such as Mustell? Answer: No.

5. Did Mustell assume the risk. Answer: No unusual risk.

6. Was the negligence of Mustell the sole cause of his death? Answer: No. (*Transcript 99.*)

The verdict was returned upon September 22nd, and upon September 29th the defendant made its motion for judgment notwithstanding the verdict, upon the grounds that it was not guilty of negligence; that it exercised all the duties imposed upon it by law, and used care to furnish the plaintiff's intestate a reasonably safe place in which to work; that no cause of action had been proven against the defendant; that there was no cause of action proven under the Federal Employer's Liability Act; that the plaintiff's intestate assumed the risk, and that as a matter of law the plaintiff was not entitled to a verdict, but that the defendant was entitled to a verdict and was entitled to judgment; that the evidence did not show that the defendant negligently

moved the car which came in collision with Mustell, or that the movement was of an extraordinary character, or was made in a negligent manner, or that the collision was caused by the negligence of the switching crew, or that the car was moved without reasonable care by the defendant; that the jury having specially found in favor of the defendant with reference to the other particulars of negligence alleged, and there being no evidence to support the other charges of negligence, that no cause of action has been proven; that the evidence was insufficient to sustain a verdict, in that the evidence conclusively showed that the car which came in collision with Mustell was not moved in a negligent, unusual or extraordinary manner; that it did show that the car was moved in the ordinary and usual manner of moving such car. (*Transcript* 101-103.) Defendant in making this motion expressly waived the right to a new trial, and asked for judgment notwithstanding the verdict. (*Transcript* 104.)

The motion for judgment notwithstanding the verdict was presented, but no argument was made, and the court denied the motion, allowing an exception to the defendant. (*Transcript* 105.) Judgment was entered in favor of the plaintiff on the verdict (*Transcript* 105), and the defendant excepted to the rendering and entering of the judgment and to the judgment, which exception was allowed. (*Transcript* 106.) The bill of exceptions was settled (*Transcript* 107), assignment of errors filed and

writ of error prosecuted to this court by petition for a writ (*Transcript* 111), which writ was allowed (*Transcript* 112), supersedeas bond ordered filed and allowed (*Transcript* 113-116) and writ of error issued and allowed (*Transcript* 114) and citation issued and served.

ASSIGNMENT OF ERRORS

The following errors specified as relied upon, and each of which is asserted in this brief and intended to be urged, are the same as those set out in the assignment of errors appearing in the printed record.

I.

That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in denying the motion of the defendant to direct a verdict in favor of the defendant, made at the close of all the evidence in the case, for the following reasons:

1. That the evidence did not show any negligence on the part of the defendant.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the defendant, under the Federal Employer's Liability Act.

3. That the evidence did not show any cause of action in favor of the plaintiff under the common law, or under the statutes of the State of Washington.

4. That the evidence showed, as a matter of law, that at the time and place the deceased received the injuries which caused his death, he knew the dangers of his employment, was familiar with the movement and manner of work in the yards, and that he assumed the risk thereof.

5. That the evidence showed that the accident was caused by the negligence of said Fred G. Mustell.

6. That the negligence alleged in the complaint was not shown to have been sustained by the evidence produced on the trial.

II.

That the court erred in denying defendant's motion for judgment notwithstanding the verdict, upon the following grounds:

1. That the evidence did not show any negligence on the part of the defendant.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the defendant, under the Federal Employer's Liability Act.

3. That the evidence did not show any cause of action in favor of the plaintiff under the common law, or under the statutes of the State of Washington.

4. That the evidence showed, as a matter of law, that at the time and place the deceased received the injuries which caused his death, he knew the

dangers of his employment, was familiar with the movement and manner of work in the yards, and that he assumed the risk thereof.

5. That the evidence showed that the accident was caused by the negligence of said Fred G. Mustell.

6. That the negligence alleged in the complaint was not shown to have been sustained by the evidence produced on the trial.

III.

That the court erred in ordering judgment to be entered in said action, in favor of the plaintiff and against the defendant.

IV.

That the court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant. (*Transcript* 108-110.)

STATEMENT OF FACTS.

On the four specifications of negligence relied upon by the plaintiff, the jury found in favor of the defendant upon three of them, and consequently the plaintiff in error, defendant below, who will hereafter be referred to as defendant, will not discuss the evidence relating to these three findings, nor to the facts which were admitted upon the trial. The jury found that it was not the custom of the defendant to place a man on the head of the car

when moved in the manner the car in question did move, and that Mustell did not rely on that custom; that the defendant was not negligent in failing to provide a rule for the warning of employes such as Mustell; that the train movement which caused the death of Mustell was not a running switch, within the intent and meaning of the rules of the defendant company (*Transcript 22*). Plaintiff did not offer any proof to show that it was customary to blow the whistle or ring the bell (*Transcript 72*), and Mustell's familiarity with the movements of the trains in the yards was admitted. (*Transcript 88*.) The general nature of the movement of the cars immediately preceding the accident was admitted (*Transcript 89*). It is not disputed that the accident happened at about two o'clock in the afternoon, in the daylight (*Transcript 98*).

Fred Mustelli, who was 23 years of age at the time of his death, had worked as night yard clerk for the defendant in its yards at Hillyard in September, 1909, and from that time until October 1st, 1910, when he became day yard clerk. In January, 1911, he became weighmaster, and shortly after that manifest clerk and car checker, and continued in that employment until the time of his death (*Transcript 62*) on September 29th, 1913 (*Transcript 14*). He had been employed around the yards for over two years prior to his death (*Transcript 73*). As weighmaster he used to weigh a great many cars and it was his duty to be down near the scales,

which are shown on Plaintiff's Exhibit 2 as the old scales upon Track 1, to weigh cars. In doing this weighing cars would be shoved onto the scale and cut off, weighed and then kicked off, without a man upon the end of the cars. He often rode in the engine from one end of the yard to the other (*Transcript* 71). When he was instructed in his duties as car checker, which was nearly two years before the accident (*Transcript* 62) he was told about the different dangers, such as approaching trains, switch engines, crossing over tracks or under cars or through cars; told to go down by the lead and then cross over, about movements on the tracks, and that he could always expect switch engines working at both ends and expect trains moving at any moment, and always to keep clear of them (*Transcript* 84).

An examination of the map, Exhibit 2, which was stipulated was correct, will show the place where the accident occurred; that he was struck at point "A" on Track 1, which was 1025 feet from the lead near the depot; that he was coming from Track 5 and his direction is shown upon the map by the letter "B."

The yards at Hillyard were used for the making up and breaking of trains, and were known as classification yards. There is a hump in the center near the word "yards"; west of that hump the yards are level and east of it they slant down towards the east (*Transcript* 67). On the morning of the accident and the day previous, Mustell had been instructing

Henry Cantley in the duties of car checker (*Transcript 77*). He told Cantley that very day to be careful; that they were liable to switch cars there most any time and kick a bunch of cars in there, and he would get hurt by them (*Transcript 77*). In the afternoon just previous to the accident, Mustell and Cantley had been out checking a train that had come in an hour before, which had been placed on Track 5. They had completed their check and started over from Track 5 to the place where the accident happened, practically across the tracks. In going across these tracks they were not engaged in any work which distracted their attention at the time from what they were going to do, nor was Cantley engaged in any conversation with him at the time (*Transcript 37*). They had been checking the records of seals, Mustell marking the destination of cars, and they were going to the depot and turn in their checks (*Transcript 32*). They were not paying any particular attention when they got close to Track 1 to see if there was anything to indicate that a train of cars was being moved on that track in the direction of the string of cars that struck Mustell (*Transcript 33*). Just before crossing Cantley glanced up and saw an indication of where a switch engine was by the smoke, which was apparently going straight up. He couldn't very well say whether the engine was standing still or going because sometimes when the engines worked hard the smoke goes straight up and other times it does not,

nor could he say whether or not he heard an engine moving (*Transcript* 33). He didn't pay any attention to the fact that there was or was not an engine working up there, only as he saw the smoke (*Transcript* 39). He didn't see the cars come against the other cars (*Transcript* 35). Neither Cantley nor Mustell were paying a great deal of attention to where they were going or anything. A. Thomas, a car repairer, saw him just about the time they got to the track that the cars were standing on, and he started to cross, and he didn't see Mustell look up (*Transcript* 82). When Cantley and Mustell got close to Track 1 they were crossing about the same time (*Transcript* 82). The first indication that Cantley had that the cars were moving on the track was when he heard the crash of the coupling. The end of the car that Mustell and he were passing by at that time moved very quickly and hit Mustell (*Transcript* 34). Mustell was ahead of Cantley and a little to his left, about five or six feet ahead of him, and when the car struck Mustell it knocked him across the rail on the outside, on the north side of the track. Cantley had one foot across and jumped back (*Transcript* 37). Mustell was observed by Thomas starting to cross pretty close to the car (*Transcript* 83). Cantley who testified for the plaintiff in response to questions of plaintiff's attorney, as to how close Mustell was to the car, said it was about three or four feet, somewhere along there; that he wouldn't be positive, and indicated

a distance from where he was sitting to the banister, which upon measurement was found to be about two feet (*Transcript* 38). He said, as he did upon a prior trial of the case in the state court, that he wouldn't swear to the distance, as to whether it was one foot or ten feet (*Transcript* 41), but he testified on the other trial substantially as he did upon this trial that the distance was between two and three feet, over two feet, he couldn't tell exactly (*Transcript* 42).

The switching crew which made the switch which resulted in a collision between the car and Mustell, was composed of a switch foreman, Steinhouse, a man who followed the engine, Farmer, and a field man, Miller. Ten cars had been put in on Track No. 1, and Miller had set three brakes upon the end cars, to hold the cars in far enough so that they could project some more cars against them. The crew went back and got some more cars from off of the other tracks, pulled up on the lead and started to back in on Track 1, with Miller on the ground to make the coupling (*Transcript* 75). The purpose of the movement was to make room for some other cars on Track 1 and to push the cars in far enough to clear the lead, so that they could have a view of the other tracks, and in order to clear the lead, the string would have to be at least three car lengths from the point of the switch (*Transcript* 76). The practice was if the movement was not to go over the hump, to put one to three brakes on,

sufficient to hold the cars, while they projected others against them to ensure coupling (*Transcript 76*). Miller was fixing the coupling on the end of the car that was attached to the engine. Before they made the coupling they rolled the cars down against the other cars. The pin did not drop. Miller signalled the engineer to back and they made the coupling. They were not hit hard enough when they first met to drop the pin down. The two cuts lacked possibly two feet, and the coupling was not made by two feet. The first time it never moved the string of cars. Miller then signalled them to back, and the cars came right on through (*Transcript 66*). He was walking alongside of the cars and they were not going any faster than he was. The intention was to shove these cars back three or four car lengths for a little room and put two or three more cars on top of them (*Transcript 66*). After the cars were coupled and had gone probably a car or a car length and a half, Farmer made the cut (*Transcrip 65*). The engine kept on shoving the cars after they had coupled on (*Transcript 66, 75, 44, 49*). The movement that took place was a shove, which is when a switch is made against a bunch of cars, they are all coupled up and shoved down the track and cut off when they start to leave (*Transcript 67*). Steinhouse, the foreman, gave the sign to push the cars, at the same time giving the sign for the man following him to cut the cars off, and just at that instant he saw Mustell fall. The cars

had already got started, and he immediately gave the sign to the engineer to stop, and he stopped (*Transcript 75*). The engine surely shoved that string of cars (*Transcript 77*). None of the switching crew knew that Mustell was near the end of the cars.

(*Transcript 66, 80, 42, 43, 44, 65-69, 75, 76, 77, 87, 89*).

Cantley heard the crash of the cars up ahead at the time they struck. He was not paying any attention to the fact that the slack was being taken up (*Transcript 39*).

During the three or four months that Miller had worked in the yards they had made similar movements to this one every day, and he had known and seen Mustell around the yards while these movements were going on (*Transcript 66, 67*). The fireman was on the gangway when they hit the cars. It had no effect on him. That movement and similar movements had happened in the yards before that time and was a very frequent occurrence. It came under the head of every day switching. It had been going on during the two years he had been in the service (*Transcript 72*). Foreman Steinhouse, who had been in yard service for nearly five years, testified that practically the whole movement up to the time the stop signal was given on account of the accident, was not an unusual movement, but was practically routine; that it was continually done all day long (*Transcript 75*). On

cross-examination he testified it was a usual movement, both as to extent and force; no difference in either (*Transcript 76*). Henry Cantley who was with Mustell at the time of the collision said that there was no difference in particular in the movement of the car at that time than any other movements in the yard previous to that (*Transcript 78*). He testified that it kicked very quickly; didn't see anything different between that and the kicking of other cars that he had observed in the yards there (*Transcript 79*). Thomas Farmer, who followed the engine, said there was no sudden jerk or smash of the engine (*Transcript 80*). Thomas, the car repairer, who worked in the yards, said that the movement was nothing more than the movements that were made daily (*Transcript 82*). Anderson, who was familiar with the movements in the yards, and who was on the ground a minute and a half after it happened, testified that this movement occurred frequently in the yards, and that he had been with Mustell several times prior to the accident when movements similar to this occurred (*Transcript 85*). William Bond, assistant yardmaster, who saw the movement, said that the speed was not very fast, just enough to move the cars a little bit; that it didn't take much to move them three or four car lengths; that this was a common movement in these yards and the every day movement in every yard that he had ever been in. Mr. Garvin, the yardmaster for the Northern Pacific, testified that it was usual; that he had seen similar switch movements

performed before in Hillyard and other yards; that when a movement similar to this one was made the end car started very suddenly; that this was an every day movement (*Transcript* 91-94).

Every one of the witnesses who saw or was present at the time of the accident testified that the movement was the ordinary and usual movement in the yard, and was not extraordinary or unusual. The same customs existed at the time of the accident as existed for ten years before in the yards, with reference to switching operations, the movement of cars, giving of signals, if any, or the failure to give them, if any, and all things incident thereto (*Transcript* 49).

The yards in which this accident occurred were the ordinary classification or switching yards of a railroad company. The yards were sometimes crowded with cars and sometimes not. They were practically level from the point where Cantley and Mustell were crossing west of the depot (*Transcript* 39). The shops were located at the west end of the yards, and employed from two hundred to five hundred men. There were five or six engines working in the yards, with the usual crew of five men, two shifts of car inspectors, oilers and airmen, or six men in a shift, two car clerks, yardmasters, conductors and brakemen, with the trains arriving and leaving at terminals from six to eight trains in and out a day (*Transcript* 50). These men usually crossed west of the depot, about a thousand feet

west of the place of the accident (*Transcript 51*). The men who were employed in the yards were the yard office clerks, car checkers, car inspectors, switching and train crews and yardmasters. The car repairers work south of the classification tracks, which are tracks numbered 1 to 10, inclusive, and on these tracks trains are made and broken up and switched in and around in various ways at different times throughout the year, for the full length of the yard (*Transcript 53*). There are hardly any men that cross the yards down in the vicinity of the accident (*Transcript 85*). The engines are all headed west in these yards, so that the engineer can get the signals always on the same side, the north side (*Transcript 67*).

In carrying on switching operations in the yards, the switching crews did not pay any attention to Mustell or car repairers or any other fellows working around the yards, to see where they were (*Transcript 67*). During the time that Mustell was working there switch engines were moving around all over the yards, without notice or warning to him. Couldn't tell when the cars were going to move (*Transcript 78, 79*). It was not usual or customary to give warnings to the men who were working on the switch tracks (*Transcript 81, 88*).

ARGUMENT.**I.**

THERE WAS NO EVIDENCE TO GO TO THE JURY UPON THE QUESTION AS TO WHETHER THE CARS WHICH STRUCK MUSTELL WERE MOVED IN AN EXTRAORDINARY, UNUSUAL OR NEGLIGENT MANNER, NO NEGLIGENCE ON THE PART OF THE DEFENDANT WAS SHOWN AND NO CAUSE OF ACTION WAS PROVEN UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT. A VERDICT SHOULD HAVE BEEN DIRECTED FOR THE DEFENDANT, AND DEFENDANT IS NOW ENTITLED TO AN ORDER FOR JUDGMENT IN ITS FAVOR.

At the conclusion of the evidence the defendant moved to direct a verdict in its favor, for the reason, among others, that there was no evidence to show negligence on the part of the defendant. The record shows that the motion was denied, without discussion, upon the statement by the court that his ruling might be reviewed by the Circuit Court of Appeals, or that he might review it himself, and upon the express understanding made with plaintiff's counsel, that in the event a verdict was rendered in plaintiff's favor, the lower court could consider a motion for judgment notwithstanding the verdict, without question, and that the same agreement should apply to this court (*Transcript* 95, 96). The trial judge made an order denying the motion for judgment, expressly stating in the order that no argument had

been made thereon (*Transcript* 105). This court, therefore, is the first court to whom is presented a discussion of the entire lack of evidence to support the claim on the part of the plaintiff that negligence is shown in the manner in which the switching operations were conducted at the time of the accident. Before the case was argued to the jury, and after the denial of the motion for a directed verdict, the defendant specially requested the court to withdraw from the consideration of the jury the question of negligence as to the claim that the movement in question, which resulted in the collision with Mustell, was unusual or extraordinary, or a negligent movement, or that there was any negligent handling of the cars, on the ground that there was no evidence to support such charge of negligence (*Transcript* 96). This request was denied. It was made, however, before the court had decided to submit any special findings to the jury, and distinctly raised the question of the sufficiency or entire lack of evidence to sustain any charge of negligence on the only question of negligence which the jury found against the defendant; that is, the question as to whether or not the cars which struck Mustell were moved in an unusual or extraordinary manner.

The plaintiff's complaint and the evidence which was introduced raised four specific questions of negligence, upon which liability was sought to be imposed upon the defendant. One was the charge that it was customary for the defendant to place a man

on the head end of the car; that is to say, the end of the car which was nearest Mustell when he was struck, in the manner the car in question did move, and if so, did Mustell rely on that custom. The jury found that the defendant was not negligent in this particular.

The second charge of negligence was that the defendant had failed to promulgate rules for the warning of employes, such as Mustell, and this was submitted to the jury as a special question, and the finding was in favor of the defendant.

The third specification of negligence was whether the train movement which caused the death of Mustell was a running switch, within the intent and meaning of the rules of the defendant, and if so, then were the rules of the defendant violated constituting negligence on the part of its employes. This was found adversely to the plaintiff's contention.

The only other ground of negligence upon which the plaintiff can rely under her pleadings is the one which was submitted under the special finding number 3, "Were the cars which struck Mustell moved in a manner extraordinary or unusual?" to which the jury answered "Yes." This specification of negligence is covered by paragraphs 9 and 10 of the plaintiff's complaint. It constitutes the only possible ground upon which the plaintiff can claim that she might be entitled to recover, for if the movement was not extraordinary or unusual, al-

though it may have been negligent—which is contrary to the fact—the plaintiff would not be entitled to recover, for the evidence and admissions of counsel are conclusive that he was familiar with the yard movements, appreciated the dangers of the movement, and consequently must have been deemed to have assumed the risks thereof.

It appears, without dispute, that Mustell had been instructing Cantley in the checking of the cars for a day and a half; that he had been expressly warned himself during his own instruction, and was warning Cantley that very morning against the danger of cars being kicked down the track; that they had for an hour immediately preceding the accident been checking a string of cars on Track 5, and were proceeding with their check lists from Track 5 directly across to Track 1, upon which the string of cars was located which subsequently collided with Mustell; that they were not engaged in any conversation; that there was nothing to distract their attention; that Mustell was a few feet ahead of Cantley and to his left, and that they were not paying any particular attention to the engine on Track 1; that Cantley saw the smoke of the engine up there, and that he couldn't tell whether the engine was moving or not, for although the smoke was going straight up, sometimes when the engine was moving the smoke would then go straight up and sometimes not. It further appears they heard the crash of the coupling being made, and that when Mustell was within from two to

four feet of the end of the car, the car moved quickly, hit him, knocking him down, running over him, causing the injuries which subsequently resulted in his death.

The jury found that the defendant was not negligent in failing to establish rules for the purpose of warning Mustell, or placing a man on the end of the car for that purpose. The question, therefore, resolves itself into whether or not the movement itself was of such extraordinary or unusual character that Mustell was not bound to anticipate its happening. The movement which took place was as follows:

The train had just come in (*Transcript* 32). The cars were set on one of the tracks and the car checkers, including Mustell and Cantley, had been down marking the destination of the cars on them (*Transcript* 32, 74). Under the usual method of doing business the foreman goes down and makes a cut wherever he thinks he can handle them safely and handily; examines the cars and destination marks as the cars are being moved, throws up his fingers to designate the number of switch to be thrown, which switch is thrown by the field man after the foreman cuts off the cars for that track, and these cars are generally kicked in on that track. If the cars are going too far, the field man protects them by setting brakes. If the impetus was not enough to send them over the hump the cars stopped of their own momentum. If it was intended to

throw other cars against them, the field man would set two or three brakes (*Transcript 74*).

After this train had come in the switching crew had put from ten (*Transcript 75*) to fifteen (*Transcript 43*) cars on Track 1, and the field man set three brakes, enough to hold the cars in far enough so they could project some more against them. (*Transcript 75*.) They went back, got some more, and pulled up by the switch leading to Track 1 and started to back in (*Transcript 75*). The whole two strings contained from about sixteen (*Transcript 43*) to twenty or more (*Transcript 65*) cars. The purpose of the movement was to make room for some other cars on Track 1, to push them in far enough to clear the lead, so that the men could have a view of the other tracks (*Transcript 76*). They were intending to place these cars where they were afterwards placed. (*Transcript 68*). They were shifting in empties on Track 1, and were switching a train and getting the city loads out to Spokane. (*Transcript 88*). They were going to shove all the cars back three or four car lengths to put some cars on top of them (*Transcript 66*). Miller, the field man, was at the end of the string that was backing in on Track 1, and was on the ground to make the coupling between the string already on one and the string that was backing in (*Transcript 65, 75, 43*). Farmer was following the engine and was getting ready to make the cut behind the engine, after the coupling was made (*Transcript 44*).

They came down against the string of cars that was already on one, and did not hit them hard enough to make the pin drop, and although the slack ran out they did not make the coupling by about two feet (*Transcript 66, 75*). The first time they never moved the *string* of cars. It might have moved the *first car* an inch or two (*Transcript 68*). They then kept on going back, the coupling was made, and they came right on through (*Transcript 66, 75*). The foreman gave the sign to push the cars, and at the same time to make the cut (*Transcript 75*). The cut was made immediately after they had made the coupling, after they had moved somewhere around a car length (*Transcript 75, 44*). It was made about four or five cars from the engine (*Transcript 44*). The cars were moved altogether about four or five car lengths (*Transcript 44*). After the foreman had given the sign to push the cars and to cut the cars off, he saw Mustell fall, and he immediately gave the sign to the engineer, and then he stopped (*Transcript 75*). When the engine was cut off it stood about a car length east of the switch on Number 1 Track (*Transcript 68*).

The entire evidence relating to the amount of force used and the ordinary or extraordinary character of the movement is as follows:

Cantley, who was with Mustell at the time of the accident, when called by the plaintiff as plaintiff's witness, testified upon direct examination:

The end of the car that Mustell and I were passing by at that time moved very quickly. It hit Mustell.

Q. Just state the relation between the coming together of the string of cars onto the cars that were standing still that you say you heard the crash—the relation between the crash and the movement of this car that hit Mustell; what I want to get at is, whether or not it was simultaneous or otherwise.

A. *Well, it moved very quickly afterwards; you know how it would be when coupling is made, how quickly the cars would move.*

Q. Well, I don't know, I don't know whether the jury would or not; but I just want to know whether there was any taking up of slack or anything of that kind before the other one moved, or whether as soon as the crash came the car that struck Mustell moved practically the same time.

A. Yes, sir. (*Transcript 34.*)

Upon cross-examination and as an illustration of the effort on the part of the plaintiff to keep out of the testimony the evidence relating to the exact movement which was made, he testified:

MR. ALBERT: Q. Now you spoke of them moving very quickly. I wish you would describe what you mean by that.

A. Well, in kicking as a usual thing, when they kick down—

MR. PLUMMER: We object to what is usual.

MR. ALBERT: That is the only way that the witness can tell.

MR. PLUMMER: No.

THE COURT: Describe this particular movement.

A. Well, when the engine comes into contact with the cars—

MR. PLUMMER: Just a moment. I have not asked you that.

MR. ALBERT: No, you have not asked him. I am asking him. You object.

THE COURT: He can testify in his own way. You may answer.

A. I mean when the engine hit these cars they moved very quickly and just as—well, I could not explain it in any other instance than comparing it with another. I could hear the crash of these cars up ahead only at the time they struck.

Q. Could you hear the slack being taken up?

A. *Well, I never paid any attention to that. (Transcript 39).*

Later, the defendant in order to bring out the facts with reference to the train movement, called Cantley as its own witness, who testified on direct examination as follows:

I had observed switching before around in those yards in a general way.

Q. *I will ask you whether or not there was any difference in the movement of that car at that time than other movements in the yards previous to that.*

A. *Not that I know of, in particular (Transcript 77, 78.)*

Upon cross-examination he testified:

Q. On this particular occasion, you being right behind Mustell as you have heretofore described and a considerable distance from where he was, you just barely had time to get out of the way so the car would not hit you, didn't you?

A. Yes, sir.

Q. On account of the quickness with which it moved?

A. Yes, sir.

Q. You didn't see anything to indicate that any car was coming against that string of cars, did you?

A. No, sir.

I just glanced up in a casual manner and saw the way the smoke was going straight up. *I didn't have the purpose in mind of seeing if there was any danger. As I said before you can't tell when the cars are going to move. (Transcript 78, 79).*

On redirect examination he testified:

Q. With reference to kicking this car down there, Mr. Cantley, you said it kicked very quickly. Now I want to ask you *how that compared with the kicking of other cars that you had observed in the yards there.*

A. *Well, as a general observation, did not see anything different. (Transcript 79, 80.)*

Thomas D. Farmer, the field man, was called on behalf of the plaintiff and later called on behalf of the defendant. Both Cantley and Farmer had been subpoenaed by both parties.

Upon direct examination in this case he testified:

The switch we were making at the time of the accident was a shove. The first I knew of the accident after I cut the cars off, I looked up and saw Mr. Mustell lying on the ground.

Q. *Was there any sudden jerk or smash of the engine there?*

A. *Not that I know of. (Transcript 80.)*

Upon cross-examination as plaintiff's witness, he testified:

We came in and coupled on to that string and kept on shoving down the yards. That was the movement that took place there. I cut the string after we coupled and started to shove down. The engine and string kept on moving right down the track after the coupling was made until the cut. The cut was made after we had moved somewheres around a car length after they were coupled, and the cars kept on shoving down there, altogether about four or five car lengths (*Transcript 44*).

Upon redirect examination his attention was called by plaintiff's attorney to a statement which was in the handwriting of one of the attorneys for the plaintiff, Mr. Lavin, and which the witness could not read on account of such handwriting (*Transcript 42*). "Just before cars taken in by us reached cars standing on Track 1, Foreman Steinhouse ordered me to cut cars off, and I did so and cars struck the cars standing on Number 1, bumping them back four or five car lengths," which he testified was true (*Transcript 45*). The defendant then offered this statement in evidence, and asked the witness to state what the sequence of events was (*Transcript 47*). He testified positively that the engine shoved the cars after it coupled onto them (*Transcript 45*); that the engine shoved them back part of the distance four or five car lengths (*Transcript 48*) and that then they ran of their own momentum (*Transcript 49*).

This is all of the direct evidence which the plaintiff produced on the question of extraordinary or unusual movement or violence or negligent handling of the switch. From the testimony of these witnesses and the plaintiff's case alone, it is apparent that the cars moved with that quickness only which is usual when a coupling was made (*Transcript* 34, 39), and that no attention was paid by Cantley and Mustell to the slack being taken up (*Transcript* 39). Farmer's testimony with reference to the sequence of the movement which occurred, contains nothing which is inconsistent with proper, ordinary and usual switching. This testimony is positive that the cars were first coupled up, ran about a car length, and that a cut was then made, the cars continuing for a distance of about four or five car lengths in all. It will be remembered that Cantley's testimony fairly shows that at that time Mustell was within two to four feet of the end of the car, and even assuming that he was as far away as plaintiff's counsel attempted to draw the conclusion; that is, that he was ten feet away, the engine was not cut off until after Mustell had been struck.

Plaintiff's counsel will attempt to claim that because Mr. Lavin grouped together in a written statement in his, Lavin's, handwriting, which the witness was unable to read, two independent statements of facts, that it must necessarily follow that these facts existed in the order of the statement written by Mr. Lavin. The witness stated explicitly, time and

again, the order in which these events happened, first on direct examination, when called by plaintiff's counsel as his own witness (*Transcript 43*), again on cross-examination (*Transcript 44*), again on re-direct examination (*Transcript 45*), again on re-direct examination (*Transcript 46*), once more on recross-examination (*Transcript 47*), and again on redirect examination (*Transcript 48*). The witness reiterated his statement six different times, that the engine had coupled onto the cars and subsequently he had made the cut separating the cars from the engine. This was done after Mustell had been hit. Yet, counsel will argue that in spite of his own witness' statement, and in spite of the direct statement of the sequence of events, and the explanation of the written statement, that because Mr. Lavin, one of the attorneys, had written down two independent facts, one after the other, that therefore the actual fact occurred in the order in which Mr. Lavin had written them down, and not in the chronological sequence which the witness testified was the fact.

Plaintiff is bound by the testimony introduced on her behalf, and there can be no question but that the witness meant that which he testified to. This witness was subpoenaed by both the plaintiff and the defendant. He had talked to counsel for both parties, testified on the former trial, and was called by both parties. Cantley was also subpoenaed by both parties, and talked with the attorneys for both of them.

In spite of these facts, an effort will be made by counsel for the plaintiff to discredit their own witnesses' testimony, because they had talked with the attorneys and representatives for the defendant, who had subpoenaed both of them; and because of such attempted discredit claim their testimony is not to be believed, except in so far as it can possibly be construed to assist the plaintiff's side of the case. Either the testimony is to be believed, or not to be believed. If it is to be believed, then it is to be taken as competent, and if so taken there is not a particle of evidence in the case to substantiate the plaintiff's claim of extraordinary, unusual or negligent switch movement. If it is not to be believed, then the only possible testimony out of which even a claim of inference can be drawn is out of the case, and plaintiff's counsel himself must concede that there was no evidence to support such charge of negligence. But, giving to the testimony all the inference even which the plaintiff's counsel may desire to draw from it, even though way beyond the import of the evidence, there is no foundation for the deduction that this was a negligent movement; and, in fact, the uncontradicted evidence conclusively shows that the movement which occurred was one which was reasonably to be expected would happen in the ordinary switching in the yards.

The other testimony which relates to this question is as follows:

Miller, who was the field man, and whose business it was to make the coupling between the two strings of cars, testified:

The train was all together after they were coupled up and it moved probably a car or a car and a half; I couldn't say exactly, something like that. The string of cars was moving eastward on down One. I was walking on the ground just a common ordinary walk. The string was rolling on opposite me and not going any faster than I was. . . . I had been employed about three or four months before in the yards. We made similar movements to that every day. I couldn't recall how many; according to how many trains was in, how many cars you have to handle. That is a very similar movement to doing switching. (*Transcript 66.*)

I couldn't say whether the end car moved suddenly or not. That is the question he asked me, if they moved suddenly. (*Transcript 69.*)

Christopher, the fireman who was on the engine which did the switching, says:

At the time or just before this movement I was putting on fire when he hit the cars. I knew when he hit the cars, but I didn't notice anything more. There was no effect on my movement on the gangway that I noticed. I was not knocked around or anything of that sort. I have heard the movement described that happened at the time Mustell got hurt. I have heard the testimony of Mr. Cantley and Mr. Farmer and other witnesses who testified directly to it. That movement and similar movements had happened in the yard before that time, it was a very frequent occurrence. It comes under the head of every day switching. It has been going on during the two years I have been in the service. (*Transcript 72.*)

Steinhouse, as switch foreman of the switching crew which was doing the switching, testified on direct examination:

Q. I will ask you whether or not that movement, as far as shoving the cars in and coupling them and cutting them off is concerned—practically the whole movement up to the time you have the stop signal on account of this accident to Mustell—was an unusual movement in the yards or not?

A. No, sir; that is practically routine. (*Transcript 75.*)

Q. Had that been done at any time before that?

A. Yes.

Q. How often?

A. Oh, I could not give the exact number of times; it is continually done all day long. (*Transcript 76.*)

Upon cross-examination by plaintiff's attorney he testified:

This was a usual movement that was carried on this day, both as to extent and force of the movement. (*Transcript 76.*)

A. Thomas, a car repairer who was on track opposite the place of the accident, and who had sixteen years' experience in the yards, testified:

The cars were moved, but I didn't notice just how hard or how fast they were moving; that is, they were kicked in.

Q. What I mean is whether or not you observed this movement so you could tell whether it was similar or different from movements that had occurred in the yards at other times prior to that?

A. Nothing more than the movements as made daily there. I could not see any difference.

Upon cross-examination he testified:

Q. That was a similar kind of a kick movement you had seen made before, was it?

A. The same movement. (*Transcript 82.*)

Leslie Anderson, who had been in the Hillyard yards seven years and was yardmaster's clerk, testified:

I have heard the testimony relating to the movement of the trains and so forth. I was with Mustell several times prior to the accident, when movements similar to this occurred, similar to the movement which occurred just previous to his death. It occurred frequently in the yards. (*Transcript 84.*)

William Bond, the assistant yardmaster, who saw the switch movement, and who had had over twenty years' experience in switching, testified:

I saw the speed with which that movement was made. It was not very fast; just enough to move the cars a little bit. It don't take much to move them three or four car lengths there, it is level. I have had an acquaintance with the movement in the Hillyard yards ever since 1902. That movement is a movement that is liable to happen on any track there any day and it is happening every day. (*Transcript 87.*)

C. H. Gephart, who for ten years had been yardmaster there, and who was called as a witness for the plaintiff as well as for the defendant, testified:

I saw the movement that occurred there. (*Transcript 89*).

Q. Had you ever seen any movements like that before in the yards, previous to this time?

A. It is a common movement, an every day movement in every yard that I have ever been in.

After the train had coupled back they were going three or four miles an hour.

On cross-examination he testified as follows:

Q. How fast was the engine going when the string of cars coupled into this standing string?

A. That is something I can not say.

Q. Approximately?

A. Just moving up there easy.

Q. Just barely moving?

A. No, after they started to back up they gave the engine some steam and they started to go back. They were going about 3 or 4 miles an hour I should think. About as fast as a man could walk, about like that. That is about the gait it would take. (*Transcript 90, 91.*)

As against this positive testimony of the character of the movement, the plaintiff contends that the following testimony was sufficient to make a case for the jury on this issue. D. Elmer Murphy, who followed braking a part of the time, and who had worked in the Hillyard yards two nights five years before the trial (*Transcript 54*), which was about a year after the accident, testified on direct examination that he had known lots of fellows when they would move a string of cars four or five car lengths, uncouple the engine before they had placed the cars. If they wanted to place them four or five car lengths further

and the engine had hold of them, he would keep on shoving until he had shoved the entire length. (*Transcript 55*). On cross-examination he testified, however, that the occasion for shoving them in that particular manner would depend on what else was wanted to be done, or what other switching was wanted to be done in the yards (*Transcript 56*). He had observed lots of fellows uncouple engines when they made shoves in Hillyard such as he had described (*Transcript 57*). Cars are tied down with hand brakes on purpose to move them by throwing cars in against them and make more room for cars on the other end (*Transcript 59*). Even on redirect examination by plaintiff's counsel he further substantiated the position of the defendant:

Q. Well, if it was intended to shove these cars further on to some other point, state whether or not they would crush other cars into them, as was done in this case, so as to move the whole string instantly, without taking the brakes off, if they are tied down?

A. Yes, sir, I have seen it done, brake the cars to slow down the others, and not allow them to run too far. (*Transcript 58, 59.*)

Thomas Kneeland, another alleged expert, who had been working on a ranch, and who was out of work at the time of the trial, testified that the last place he worked was as helper at Vancouver, Washington (*Transcript 59*). He didn't pretend to have any experience in the Hillyard yards. All that he testified to with reference to the switch movement was:

Q. If there is a string of eight cars standing on a track in a yard and you want to move these cars up a distance for piling for instance, is there any necessity for making—for doing that by a kick switch?

A. Why, no, if they were kicked in there, there would be a man on them to see that they coupled, that a coupling was made. The proper way to do would be to place this engine and let him kick the head to see whether the cars were coupled up or not, because they are liable to run out the other end, if it is a yard where there is a hill at both ends.

Q. If the engine is coupled onto the end of the cars?

A. You ought to have a man on the hind end to see whether there is a brake step on there or not.

Q. They could be shoved in a distance of four car lengths and placed them without doing any kicking?

A. Yes, if there is room enough. (*Transcript* 59, 60.)

M. T. O'Brien, who was discharged from the employ of the defendant for his responsibility in a head-on collision in August, 1910, three years before the accident, testified that frequently in switching in the yards, other cars were frequently thrown down on several tracks, and if they were not going very fast they would stop themselves (*Transcript* 61). That in *coupling* a string of cars onto another string of eight or ten cars it was not necessary to move any of the standing cars at all (*Transcript* 61).

On cross-examination he testified, however, that if it was necessary to send them four or five car

lengths, "you kick them after you couple into them" and send them four or five car lengths (*Transcript 62*).

M. E. Snyder, who had a lawsuit against the defendant, which is still pending, testified that he had been a switch engineer, but that he had left the service on April 2nd, 1912, a year and a half before the accident; that if you want to *couple* a string of cars with a string of eight or ten cars, it isn't necessary to move any of the cars that were standing still (*Transcript 63*). It was customary there to couple onto them and shove them down (*Transcript 63*).

The most that the plaintiff's counsel can legitimately claim that this testimony shows is that when one string of cars is coupled onto another string of cars, it is not necessary to move the other string, but that if it is intended to move the second string the engine can keep on shoving them down, without cutting them off. There is not in this one syllable of proof which combats the defendant's position. The intention in this instance was to place these cars four or five car lengths further on, whether it was by a kick or a shove. Their own witness O'Brien testified that if it was intended to move them on four or five car lengths "you kick them after you couple into them" (*Transcript 62*).

But the distinction between kicks and shoves, cutting of cars before coupling is made and cutting of

cars afterwards, are all lost when the testimony of Mr. Garvin is taken into consideration. This is absolutely undisputed by any witness. Garvin has had over twenty years of actual yard experience in six different railroads, and was in charge of the coach yard of the Northern Pacific Railway Company at Spokane, and was familiar with the switching in the Hillyard yards. He had heard all of the testimony and had seen switch movements made in the Hillyard yards, similar to the one described in the testimony.

In coupling up cars he observed what the action was on the drawbars, slack in the cars and in the springs when the coupling was made. He testified that with ten cars there would be twenty feet of slack in the springs, and that with an engine going three or four miles an hour, when the impact goes against these cars they naturally spring apart; and that when the coupling was made the spring pressure goes up first before the end car moves, and then when it moves it moves suddenly (*Transcript 92*). This is the usual course when couplings are being made (*Transcript 93*). He observed every day movements similar to the one which took place at the time of the accident (*Transcript 93*). It would not take much force to send the cars suddenly and violently, turn the cars on the track or to make the head car move suddenly. It could be done with an engine going through at three and one-half miles per hour (*Transcript 94*).

Even the testimony of a ranchman out of a job, a man who had been a switchman for only two nights five years before the accident, an engineer who had been discharged for his responsibility in a head-on collision three years before the accident, and a switch engineer who had left the service of the company a year before the accident, and who was then suing the defendant, could not be made sufficient to properly make an issue for the jury on an alleged unusual, extraordinary or negligent movement. They all admitted that it was the usual and ordinary movement to keep on with the movement of the cars after they had been coupled up. That was all that was done here, and it was done in the manner described by their own witnesses as a proper method. But the result, whether a kick or a shove or the throwing in of cars onto another string, was the same. The impact of a shove going at three or four miles an hour, would necessarily result in making the end car move suddenly, on account of the springs in the couplings.

Every witness who saw the accident or the switch movement, or who heard it described, testified that it was the ordinary, usual, routine switching movement, and that it was going on every day in the yards. Their own witnesses who were called by them, Cantley and Farmer, could see no difference between this movement and the others that they had known there. The switchman, Miller; the foreman, Steinhouse; car repairer, Thomas; Bond, the assistant yardmaster; Gephart, the general yardmas-

ter, all of whom were witnesses to the accident; yard clerk, Leslie Anderson, and Garvin, the Northern Pacific yardmaster, all testified that it was the regular method of switching in the yards.

In this court it takes something more than some evidence, or any evidence, to make a case for the jury. There must be substantial evidence. In a case of this kind, with the evidence absolutely lacking—where there is no evidence to sustain a verdict—there should be judgment ordered for the defendant.

It may perhaps be claimed that because the defendant objected to certain questions asked of the witnesses, or that certain objections to such questions were sustained, upon the ground that they invaded the province of the jury, that it was thereby admitted by counsel or determined by the court, that there was an issue for the jury already made by the testimony on those questions. This is, of course, a *non sequitur*. Questions which in effect seek to elicit an opinion of the witness as to whether the defendant was negligent, or whether the plaintiff is entitled to recover, are clearly objectionable, whether or not there was or might be any evidence or no evidence to support the verdict. It was the duty of counsel to elicit the facts, and not to attempt to drag conclusions out of the witnesses, which were ultimately questions for the jury to decide—when and when only the plaintiff had produced sufficient evidence to make them such questions.

It was a common practice for the cars to move suddenly in the yards. Plaintiff's own witness Cantley testified that "You can't tell when cars were going to move" (*Transcript* 79). Kipple, when he instructed Mustell in his duties as car checker, told him that he always must expect trains moving at any moment, and to always keep clear of them (*Transcript* 84), and Cantley was told by Mustell himself that very morning that they were liable to switch there most any time and kick a bunch of cars in there and he would get hurt at it (*Transcript* 77).

With this testimony in the record, it is perfectly apparent that cars did move suddenly and quickly in the yards; that this was a usual occurrence, and that it was the duty of Mustell himself to expect such movement and that there was no negligence in a sudden and quick car movement.

Under the circumstance in this case, the rule stated in *Ryan v. Northern Pacific*, 53 Wash. 279, 101 Pac. 880, is directly apposite. Plaintiff in that case was employed by the railroad company as call boy in its freight yard office in Seattle. His duties called him back and forth across the yards, consisting of a large number of tracks. No one was permitted in the yards except employes. Plaintiff was engaged in learning his duties from his predecessor on the afternoon of his injury. He had gone out into the yard to tack some cards on certain freight cars there, and in returning they came to a string of about a dozen cars standing on an intervening track. Instead of

going around the cars they undertook to cross over them and as plaintiff was in the act of passing through, a car was shunted against the string and plaintiff was thrown off the car which he was attempting to cross and his right leg was run over. In response to the plaintiff's argument that the railway company was guilty of negligence on account of the manner in which the cars were handled in the yard, the court said:

“The freight yards of the respondent were private yards. No one but employes were permitted therein. Anyone knowing how the yards and cars were operated did not need any further warning. The fact that whistles were not sounded and bells were not rung did not tend to show negligence, because under the conditions there, where numerous engines were running backwards and forwards, such sounds would only create confusion, and would afford no protection. No one was supposed to be about the cars except employes, who necessarily would know, immediately upon entering the yards, that cars were liable to be moved at any time without any warning. Even if the appellant was directed to go into the yards, he knew of the conditions and the places where he would be safe; and if he knew it was dangerous to cross a track where cars were not standing, as he testified he did, he must necessarily have known it was much more dangerous to cross over cars standing on such tracks. In view of the age and experience of the appellant as shown by his own evidence, we see no escape from the conclusion that his own negligence was the cause of his injury.”

Ryan v. N. P. R. R. Co., 53 Wash. 279; 101 Pac. 880.

II.

MUSTELL WAS THOROUGHLY FAMILIAR WITH THE SWITCHING MOVEMENT, APPRECIATED ITS DANGER AND ASSUMED THE RISK.

The jury found that it was not the custom of defendant to place a head man on the car, when moved in the manner that this car was, or was negligent in failing to provide a rule for the warning of employes such as Mustell, and again found against the plaintiff on the question of negligence which was injected into the trial, as to whether or not a running switch had been made in violation of defendant's rules. In response to the question, "Did Mustell assume the risk?" they answered "No unusual risk" (*Transcript* 100). This, of course, did not answer the question categorically, and leaves the question of assumption of risk open for discussion. Even if it could be claimed that because the jury found that the movement was an extraordinary or unusual movement, that therefore the finding that he assumed no unusual risk was a finding that he did not assume the risk, the question still is open as to whether or not the evidence was substantially conclusive that as a matter of law, he did assume such risk, or whether there was not some evidence, or substantial evidence, which took away from the court this decision of assumption of risk, and made it a question for the jury.

Even assuming, for the purpose of argument, that

notwithstanding the conclusive character of the testimony showing that this was not an unusual or extraordinary movement, there was some evidence tending to show that the movement as made was negligent, the evidence does show, as a matter of law, that Mustell was thoroughly familiar with it, and appreciated its dangers.

The question of assumption of risk was raised by the motion to direct a verdict (*Transcript* 95) and the motion for judgment notwithstanding the verdict (*Transcript* 103) and is included in the assignment of error (*Transcript* 109), having been raised as a defense by the answer (*Transcript* 19).

Mustell's familiarity with the movements of trains in the yards there was expressly admitted by plaintiff's counsel in open court (*Transcript* 88). Henry Cantley testified: "As I said before, you can't tell when the cars are going to move" (*Transcript* 79), and further that Mustell had that very day been instructing him.

"He said for me to be careful. I had a habit of climbing around on the cars, I was new at the work, and he told me to be careful about it; *that they were liable to switch there most any time and kick a bunch of cars in there*, and I would get hurt at it. That was that day. The accident occurred shortly after noon" (*Transcript* 77).

Kipple, who instructed Mustell in his duties, testified:

"I told him all about the different dangers, such as approaching trains, switch engines, crossing over tracks or under cars or through cars and things of that kind, and told him to go down by the lead and then cross over, because he wouldn't make any time and that has always been my experience as long as I have been there. I told him about the movement on the track; you always expect switch engines working at both ends; you could always expect trains moving at any moment and always keep clear of them" (Transcript 84).

Upon cross-examination, Cantley in testifying with reference to the way the smoke was going up at the head end of the train said that when he glanced up there *he didn't have the purpose in mind of seeing if there was any danger*; that they couldn't tell when the cars were going to move; that although he didn't see anybody on top of the cars or any man on the ground or any indication of cars coming, he didn't think he was any more safe in crossing there than going around any other car; that they wouldn't have tried to have crossed if they thought that there was danger there, but that he didn't see any difference between the kicking of that car down there and the kicking of other cars that he had observed in the yards (Transcript 79).

The testimony of Cantley (Transcript 34, 39, 77, 80), Farmer (Transcript 80, 45, 47, 48), Miller (Transcript 69), Christopher (Transcript 72,) Steinhouse (Transcript 75, 76), Thomas (Transcript 82), Anderson (Transcript 84), Bond (Transcript 87),

Gephart (*Transcript* 89, 90) shows conclusively that this movement was an every day routine switching movement, which had occurred continuously many times a day for several years; that Mustell's duties as weighmaster (*Transcript* 71), night yard clerk, day yard clerk, manifest clerk and car checker (*Transcript* 62), his riding in the engine (*Transcript* 71), his being with Anderson when frequently similar movements were made (*Transcript* 85) and the express admission of his familiarity with the train movements (*Transcript* 88), demonstrate to a certainty that he knew that such movements were likely to be made most any time, and that they were so dangerous that he had to keep clear of them. His passing within a few feet of the end of a car, which he admittedly knew was dangerous, besides being evidence of gross negligence on his part, shows that in so doing he voluntarily took the chance, and that he assumed the risk thereof. The statement of Cantley that they certainly would not have tried to cross if they thought there was danger there (*Transcript* 79) must be taken into consideration in connection with the balance of his testimony, that "I didn't have the purpose in mind of seeing if there was any danger," that they couldn't tell when the cars were going to move; that this car didn't kick any more quickly than other cars moving in the yards, Mustell's express instruction to Cantley on that very day that they were very liable to switch there most any time and kick a bunch of cars in there, Kipple's instructions to Mustell of the dangers

of crossing over tracks, and that he could always expect switch engines working and trains moving at any moment and always keep clear of them. Thomas' testimony that neither he nor Cantley were apparently paying a great deal of attention to where they were going, or anything; that they started to cross pretty close to the car, is, in connection with the testimony just referred to, positive proof that in crossing as he did, he was taking the risk which it necessarily involved.

It might be conceded, for the purpose of the argument only of this point, that the contention of plaintiff that this movement could have been made in a way which would not have involved the quick movement of the car nearest Mustell, in the manner in which that car was moved, but in view of the uncontradicted testimony of the frequency of this very movement during Mustell's employment, and his continuance in that employment for years prior to the time of the accident, while this movement was going on, necessarily charges him, not only with the knowledge, but with the appreciation of his danger, for it was open and apparent. Moreover, and beyond this, we have express and direct testimony as to such appreciation, and the only conclusion which can properly be drawn from the evidence is that he was thoroughly familiar with the switching movements in the yards, of which this movement was one; that he appreciated the danger of it, and assumed its risks.

Where it was customary to kick cars in on different tracks in the yards, and the field man, Voelker, was injured by reason of a sudden kicking in of a second string of cars on a string already there, and between the cars of which Voelker had stepped to open the knuckles of one of the cars, the court held that he would assume the risk.

“If it was general and uniform, and was observed during his continuance in the service, it was manifestly within, not merely his means of knowledge, but his actual knowledge. He was an experienced railroad employee, and was familiar with this branch of that service, having been in defendant’s employ as a brakeman and switchman for a period of eight years. He therefore understood the dangers incident to the observance of such a custom. There can be no claim, under the evidence, that the injury was wilfully and wantonly inflicted. Nor was the custom an unreasonable one. Whether or not there was occasion to go between the cars, and thus assume a position of exposure to injury from the movement of other cars, would be known to the field man, but not to the switching crew. His position would enable him to judge of the character and probable duration of the exposure better than could be done by others. He would be primarily in a place of safety, would know that the work in which he was engaged was, in a larger sense, that of moving cars and making up trains, and, being in control of his movements, would not assume a position of danger without some volition of his own. If, in the presence and during the observance of a general and uniform custom of the character stated, Voelker continued in the service of defendant, he assumed the risk of injury arising from its observance.”

Chicago, M. & St. P. R. R. Co. v. Voelker,
70 L. R. A. 271; 129 Fed. 522.

A switchman employed in yards, who was killed while uncoupling cars by the impact given to the cars on one side of him by cars of a train backing in from that direction, without warning, was held to have assumed the risk.

“But the deceased was a competent man. He had been employed in that yard as a switchman for eight or nine months, and was familiar with the manner in which the business was carried on. It is true that during that time he was at work in that part of the yard known as the ‘running yard,’ out of which cars were run into that part where the cars needing repairs were separated, and switched off upon different tracks according to the gravity of the necessity for repairs. But his experience there was in a place where he had equal means of information in regard to the management of trains or cars sent thence into the next yard as if he had been in the yards into which they were taken. The taking out and the taking in of trains were parts of the same operation. On the morning of the accident he had been directed to take charge of a switching crew in that part of the yard where some cars needing repairs were collected and which were required to be sorted out and separated; and, although a foreman, was doing work belonging to a switchman, a thing shown to be not unusual. The manner of the switching and the movements of cars that day was not different from that which had been pursued during the whole period of his employment in the yard. If this accident had happened directly after his employment began, it might have been said that he had the right to rely upon the presumption that his employer had taken proper precautions for making the business reasonably safe for its employes. And the same rule would have held good if the sources

of danger were beyond his ken, and the employer had permitted them to continue while the servant was in his employment, for the employe does not assume risks which are not apparent and of which he knows nothing. But here the dangers were not obscure. On the contrary, they were perfectly obvious, as open to the deceased as to any one, and had been for a long time. The case is one falling within the exception to the rule above stated. The exception is, as stated by Mr. Justice Day in *Choctaw, etc., R. R. Co. v. McDade*, 191 U. S. 64, 68; 24 Sup. Ct. 24, 25; 48 L. Ed. 96:

‘That when a defect is known to the employe, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge, and without objection, without assuming the hazard incident to such situation.’”

Nelson v. Southern Ry. Co., 158 Fed. 92.

See also

Collins vs. Pa. R. Co., 148 N. Y. S. 777.

Landicino vs. Chicago & Alton Ry., 171 Ill. App. 396.

It conclusively appears from the evidence that Mustell was an experienced yard employe, thoroughly familiar with movements in the yards, perfectly well aware of the danger in crossing tracks close to the cars, and had an active appreciation of it, which is shown by instructions given to him and by him. Neither he nor the man who was with him were paying any particular attention to what was going on, on the track over which they were crossing, and he passed close to the end of the car, within three or four feet of it, when any coupling made for the purpose of accomplishing the movement which

was intended in this case, of shoving or placing of the cars three or four more car lengths must necessarily result in that car moving suddenly. Under the facts in this case it is perfectly clear that not only was there no negligence upon the part of the defendant, but that Mustell assumed the risks of the movement, as made. Not only upon the findings of the jury that the defendant was not guilty of negligence in failing to promulgate a rule to warn Mustell, and the further findings that this was not a running switch in violation of the rules of the company, nor was it customary to place a man at the end of the car to warn him, taken in connection with the evidence upon the question of the unusual or extraordinary character of the movement, and the assumption of risk is the defendant entitled to a judgment in its favor, but upon the whole case and on all the questions the record disclosed the entire absence of evidence to show any negligence on defendant's part.

We well understand the rule of this court with reference to special findings and the consideration of the sufficiency of the evidence to support them, and in this case there is not only an insufficiency of such evidence, but an entire failure of proof to support the finding that this was an extraordinary or unusual movement or that the plaintiff did not assume the risk, if the answer of the jury that he did not assume

any unusual risk can be construed to mean that he did not assume the risk in this case. In considering the effect of the findings, the court will understand that these findings were finally submitted over defendant's objection (*Transcript* 99). We do not believe that this court will hold that after the defendant has challenged the sufficiency of the evidence to sustain any verdict, by a motion to direct a verdict, and moved to exclude from the consideration of the jury, on account of lack of evidence to support any verdict in favor of the plaintiff thereon, the only question upon which any finding of negligence was made, and further objected to the submission of the special findings, that because such special findings were submitted and answered, that thereby the defendant in this state of the record, is precluded from discussing the question of the entire lack of evidence to sustain any finding which would support any verdict in favor of the plaintiff.

The motion to direct a verdict was denied upon the understanding that either the court below or this court could order judgment notwithstanding the verdict, and the court below having decided such motion without argument, the case is now before this court for the rendition of substantial justice. In the consideration of the decision thereon, we respectfully submit that the entire record discloses no negligence upon the part of the defendant, and it

is demonstrated, as clearly as testimony can, that the plaintiff's intestate assumed the risk.

Respectfully submitted,

CHARLES S. ALBERT,
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Attorneys for Plaintiff in Error.

NO. 2509.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GREAT NORTHERN RAIL-
WAY COMPANY, a Corpora-
tion.

Plaintiff in Error,

vs.

GRACE MUSTELL, as Adminis-
tratrix of the Estate of FRED
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said FRED G. MUSTELL, de-
ceased, and for and on behalf of
GRACE MUSTELL, the widow
and minor child, respectively, of
said FRED G. MUSTELL, de-
ceased.

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

*Upon Writ of Error to the United States District
Court, for the Eastern District of Washing-
ton, Northern Division.*

PLUMMER & LAVIN,

Attorneys for Defendant in Error

Old National Bank Bldg., Spokane, Wash.

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BRIEF.

This writ of error is sued out, the object of which is to reverse the action of the lower Court in refusing to grant defendant judgment *non-obstante-verdicto*. No new trial is asked for or desired. No errors of law are claimed, excepting the one above referred to, and in support of defendant's position, it is claimed that there is no evidence, or no reasonable inferences to be drawn from the evidence, which could, considering it most favorably to the plaintiff, sustain the charge of negligence alleged in the complaint.

While defendant refuses to specifically admit that the deceased Fred G. Mustell was, at the time of his death, employed in interstate commerce by the defendant company, the condition of the pleadings are such that it must be held, as a matter of law, that the deceased was so employed. The answer admits that defendant is an interstate railroad, and that the deceased was a car checker, performing his duties as such in the division yards at Hillyard, Washington, at the time of his death. The case of *St. Louis, San Francisco & Texas Railway Company vs. Seale*, 57 Law Edition, United States Supreme Court Reports, page 1129, holds that a car checker of interstate cars, is employed in interstate commerce, within the meaning of the Federal Employers' Liability Act.

The complaint sets up the destination of the cars which were checked by Mustell, and whose report

he was carrying to the depot when he was killed, and the answer admits that said cars were destined to Vancouver, British Columbia, Canada. Therefore, it must be conceded that he was employed in interstate commerce, this concession having been made, there is no Federal question left in the case. We refer to this, because one of the assignments of error made by defendant is "that defendant was not guilty of negligence within the meaning of the Federal Employers' Liability Act." It must be conceded that what constitutes negligence at common law, constitutes negligence within the meaning of the Federal Employers' Liability Act. Negligence in one instance, must be negligence in the other. There is no such thing as negligence "within the meaning of the Federal Employers' Liability Act," because that Act does not define what is, or what is not negligence. It leaves us to follow the common law rule.

Therefore, in discussing the question of negligence in this brief, we will discuss common law negligence only.

We have always deemed it one of the duties of counsel in the presentation of a case to the Court to do everything possible to aid the Court in determining the legal questions involved, and knowing the rule of law that has been laid down by this Court, and every other Court, by thousands of decisions, against which there is no dissenting opinion, to-wit: that in the consideration of the question in-

involved in this case, *the Court must consider the evidence, and that evidence, which is most favorable, and in the most favorable light, together with all reasonable inferences which the jury would have a right to draw from said evidence, in support of the verdict and judgment of the lower Court*, counsel for defendant has followed out the usual and customary practice of attorneys for defendants in these class of cases, and has seen fit only to call the Court's attention to the evidence in the record which is *most favorable to the defendant*, and in defendant's most favorable light.

Of course, able counsel for the defendant must know of the rule heretofore referred to, and knowing that this Court will consider the evidence with all of the reasonable inferences to be drawn therefrom, in its most favorable light, in order to sustain the verdict, we cannot understand why the defendant's counsel should not present its argument along those lines, and thereby aid the Court very substantially and materially in determining the questions involved.

In answering the defendant's brief, we will present the evidence in the manner and form which this Court will consider, to-wit: in the most favorable light to sustain the verdict and judgment of the lower Court, and if upon all the evidence, together with all the reasonable inferences to be drawn therefrom, the Court can say as a matter of law that there was no negligence of the defendant,

and that no two reasonable minds could differ, then this cause should be reversed, otherwise, it should be affirmed.

If the Court can further say that if the defendant was negligent, the deceased assumed the risk of this negligence; that negligence was so universally the custom of defendant in carrying on its switching operations that the deceased either knew, or ought to have known of such universal negligence, and appreciated the risk he was taking in performing his duties in the defendant's yards, and that no two reasonable minds could differ thereon, the judgment must be reversed. These are the only two legal points involved in this case.

STATEMENT OF THE CASE.

Fred G. Mustell, twenty-three years of age, being married and having a wife, and a child nine months old, was a car checker in the yards of the Company at Hillyard, Washington. Immediately prior to his death, he had just completed the checking of a train composed of interstate and intra-state cars, and was on his way to the depot to turn in his report, so as to enable the Company to conduct its switching operations in carrying on its interstate business. After completing the checking of said train standing on track number 5, and after instructing Henry Cantley with reference to the duties of a car checker, he and Cantley start across the tracks in the direction of the depot, passing through that part of the yard through which it was usual and

customary to pass on such occasions. In doing so, it became necessary for him to cross over track number 1, upon which was standing perfectly still, tied down by brakes, a string of sixteen box cars. Mustell and Cantley attempted to cross said track number 1, a reasonably safe distance from the end of said string of cars, the distance being anywhere from one foot to ten feet. Mustell was a few feet ahead of Cantley, and slightly closer to the end of the string of cars. There was nothing to indicate to Mustell or Cantley that any cars were being kicked down upon the standing string of cars. The switch engine which was in operation, and the only one about which any testimony was given, was standing up near the depot about 1025 feet from the point where Mustell was killed, the smoke of which engine was going straight up, which indicates to any rational person that the engine must have been standing still. The map offered in evidence, shows that the track curves from its intersection with the main line, so that if a string of cars was moving towards the string that was standing still, it could not be seen, but the movement of the engine could be determined by the smoke and puffing providing the engine was shoving the string of cars, but if the string of cars was kicked in, the engine would still remain standing at the point from which the kick was made, and the smoke would go straight up, as it did. One of the reasonable inferences to be drawn from the evidence is that if a string of cars were kicked in

onto the string that was standing still that hit Mustell, *in the ordinary manner*, or in a reasonably careful or usual manner, it would take up the slack of the standing string of sixteen cars, which would give Mustell sufficient warning that said string was about to move, so as to enable him to get out from any position of danger, but, just as Mustell got onto the track, the whole string of sixteen cars suddenly and without warning moved forward and violently, striking Mustell before he could get out of the way, and Cantley just barely had time to jump out of the way.

The string of sixteen cars moved four or five car lengths before it stopped. The movement of the standing string of cars was caused by another string of cars being thrown in on track number 1 with such violence, colliding with said string of sixteen cars in such a manner, and with such a forcible impact that Mustell was not able to get out of the way, and was killed.

The accident happening upon the premises of the railway company, and in the presence of witnesses only who were in the employ of the company, and the deceased being dead and his lips sealed, we appreciate how difficult it is for us to obtain any as direct evidence as we would like to obtain as to the real facts which caused the death of Fred Mustell, and are compelled to resort largely to circumstantial evidence, aided by direct evidence and physical facts. No bell or other signal was

given, nor was any movement observable which would indicate to Mustel that it was not perfectly safe to cross track number 1, a reasonable distance from the end of said string of standing cars. There was nothing to indicate to Fred Mustell or to any one else that a string of cars was going to be crashed against the standing string of cars with sufficient violence to cause the whole string to move four or five car lengths suddenly, so as to catch Mustell before he could get away, Mustell knowing, as he probably did know, and as defendant alleges he did know, that said string of sixteen cars had their brakes set, or were, in other words, "tied down."

ARGUMENT.

We have used the terms plaintiff and defendant instead of plaintiff in error and defendant in error, and will continue to use the same terms in our argument.

At the outset, we wish to correct one inference or statement made in defendant's brief, and this to the effect that the motion for non-suit and motion for directed verdict at the completion of all the evidence was not argued to the Court. Counsel knows very well unless his memory is exceptionally deficient, that the above motions were thoroughly argued by him, but so well did Judge Rudkin remember the evidence, and so well versed is he in the law of these cases, he did not desire to

hear the plaintiff's argument in resistance of said motions. We admit that he did refuse to hear any argument when the motion *non-obstante-verdicto* was made, because all of the points had been so thoroughly thrashed out before, and so well satisfied was the Court with his former ruling, that a repetition of the same argument was unnecessary; therefore, when counsel say that this Appellate Court is the only Court that has had an opportunity to hear arguments on the questions of law involved in this case, the most charitable statement we could make is that he is in error.

This case was partly tried in the Superior Court of Spokane County, and upon plaintiff's motion, a voluntary non-suit was granted and suit brought in the Federal Court. Prior to the partial trial in the Superior Court, and before the energetic counsel for defendant had talked with or seen witnesses Henry Cantley or Thomas D. Farmer, counsel for plaintiff took the precaution to get a written statement from each of these witnesses, signed by themselves, in which they stated just how the accident occurred. Thereafter, as the record shows, witness Cantley, who was still in the employ of the Company, but had been subpoenaed by plaintiff, made frequent trips to the office of the attorney for the defendant, and on numerous occasions discussed the case with said attorney, as also did witness Thomas D. Farmer, who was one of the crew that killed Mustell, and thereafter, when

both of these witnesses were called by plaintiff for the purpose of proving their case against the defendant, the record will show that they squirmed around and attempted to reconcile their former written statements with their testimony, and at the same time testify as favorably as possible to their employer. The statement made in writing by Farmer before he had made the numerous visits to the offices of the attorney for defendant, and before he had ever seen said attorney, were offered in evidence in the case, and read to the jury, and the witness Farmer testified that said statement in writing *was true*. Of course the Company's attorney tried to reconcile the written statement with his testimony, tried to change the sequence of events so as to make said written statement consistent with defendant's theory of the accident, but we say the jury had a right to consider, and find as a fact, that the statement made in writing when said witness Farmer was wholly independent of any influence, when he was not working for the Company and lived down at Cheney, Washington, when he had no object in telling anything but the truth, was the true statement of just how the accident happened, and the sequence of events was in fact as related by him in said written statement, and especially so, when upon the stand as a witness the said Farmer testified that the facts contained in said written statement were true. On cross-examination he testified as follows (Rec. p. 45):

“Q. Then the engine did not shove the cars after the collision between the engine—

A. Yes, they did.

Q. Just a moment. Then the engine did not shove the cars after it coupled into them, at all, did it?

A. Yes, sir.

Q. Since the last trial of this case, you have been up into Mr. Albert's office on numerous occasions, and he has talked to you about this case, notwithstanding the fact that you were subpoenaed as our witness and was called by us at the former trial, and re-hashed and rehearsed your testimony in his office on two or three occasions, haven't you?

A. I have been up in Mr. Albert's office, yes, sir.

Q. And he has been talking to you about your testimony and what you knew about the case?

A. He said very little to me about the case.

Q. I didn't ask you how little or how much; he has been talking to you about it, hasn't he?

A. Yes, sir.

Q. When you made this statement that I have shown you, you had not talked to Mr. Albert or Mr. Ryan, the claim agent at all, had you?

A. Yes, sir.

Q. Didn't you testify—

A. I talked to Mr. Ryan.

Q. You talked to Mr. Ryan?

A. Yes, sir.

Q. But you did not talk to Mr. Albert?

A. No, sir, I did not.

Q. Now, since you have talked to Mr. Albert, after making this statement that you cut the cars off and they came in collision with the other cars which caused them to move four or five car lengths—

A. I didn't say it was just before the cars was coupled—

Q. Wait a moment. You now say that you moved into them and moved up about a car length before you cut them off?

A. Yes, sir, we moved into them and as soon as I could get over there and cut the cars off I did so.

Q. What do you mean by saying, "Just before cars taken in by us reached cars standing on track 1, Foreman Steinhouse ordered me to cut cars off and I did so, and cars struck the cars standing on No. 1, bumping them back four or five car length." Is that true?

A. That is true."

Therefore, we will say according to this statement, and Farmer's evidence that the statement is true, the jury would have a right to find that the cars taken in on track No. 1 were being shoved rapidly by the engine; that the cars were then cut off from the engine, leaving the engine standing still, and the "smoke going straight up." The cars run down upon their own momentum, striking the sixteen cars so violently as to cause them to move all at once without taking up slack, or giving any other warning, so that the rear end of

said string of cars moved so suddenly that Mustell did not have time to get out of danger, and thereafter said cars continued to move four or five car lengths.

Let us ask this question, "What does the witness Farmer mean when he says, 'and cars *struck* the cars standing on number 1, *bumping* them back four or five car lengths?'" and he says, "This statement is true"; in other words, that is exactly what happened. Afterwards, upon being called as a witness for the defendant company, and in order to favor the company, he tries to say the switching operation was simply a shoving and not a bumping or striking of cars against other cars. Of course, we do not know what he would have said in the interest of the railroad, if we did not happen to have him tied up with a written statement, before he *saw* the company's attorney. It was claimed by defendant's witnesses, that it was intended to move said string of cars four or five car lengths so as to clear the track in some manner. If that is true, let us ask why was it necessary to slam a string of cars against a standing string of cars in the manner in which they did? And again defendant tries to extricate itself from the charge of negligence by saying this was the usual and customary way of handling cars in the Hillyard yards. Of course the jury is not compelled to believe such an unreasonable and ridiculous statement made by the employees of a

railroad company, even if such statement was undisputed. On page 47 of the Record, Farmer testifies as follows:

“Q. If it was necessary to move that string of cars four or five car lengths, was there anything to prevent the engine from pushing them on that distance and then cutting off?”

A. No, sir.”

Therefore, if it was not necessary to move those cars in the manner in which they were moved, isn't that a circumstance tending to dispute the witness for the company testifying that such violent movement was usual and customary? It must be presumed that when switching crews are exercising reasonable care in the handling of their trains and cars, that when they desire to place cars upon a certain part of the track, they do so in a manner least calculated to injure other employees who may be performing their duties in said yards, and less calculated to smash up and destroy railroad equipment. It might be that when a faithful employee has been killed by the gross and almost wanton negligence and recklessness of train crews or switching crews, and he is not alive to dispute what is said against him, that said train crews would be allowed to testify that it was usual and customary to carry on switching operations at a speed of a mile a minute, but no reasonable jury who are possessed of a human thinking apparatus would be expected to believe such impossible statements, whether disputed or undisputed, and the

juries are instructed in every case, that they are not compelled to believe any statement of any witness which appears so improbable as to, in their minds, destroy its value as evidence. Henry Cantley, on page 35 of the Record, testifies as follows:

“Q. Can't you tell whether or not you could see westerly what was going on there (meaning looking toward the engine)?

A. I could see up as far west all right. I did not see these cars come on to these other cars. I looked.”

On page 34 of the Record, he testifies:

“I didn't see any cars moving on this track.

Q. What was the first indication to you that cars were moving on track number 1, if they were moving?

A. I heard the crash of the coupling. The end of the car that Mustell and I were passing by at that time moved very quickly. It hit Mustell.”

On page 78 of the Record, he testifies:

“Q. On this particular occasion, you being right behind Mustell, as you have heretofore described, and a considerable distance from where he was, you just barely had time to get out of the way so the car would not hit you, didn't you?

A. Yes, sir.”

Again on page 79 of the Record, he testifies:

“Q. On account of the quickness with which it moved?

A. Yes, sir.

Q. You didn't see anything to indicate that any car was coming against that string of cars, did you?

A. No, sir, I just glanced up in a casual manner and saw the way the smoke was going straight up. I didn't have the purpose in mind of seeing if there was any danger. As I said before, you can't tell when cars are going to move.

Q. As a matter of fact, when you didn't see anybody on top of that car and did not see any man on the ground and did not see any indication of any cars coming, you thought you were perfectly safe in crossing there at that time.

A. Not any more than—

Q. (Interrupting) Well, you thought you were perfectly safe.

A. We certainly would not have tried to cross if we thought there was danger there."

The Court will notice in reading this testimony on record, that the witness tried to inject into his answers statements indicating that he was not thinking anything of danger, and was not paying any attention to anything, which statements it is apparent were injected into his answer to voluntarily destroy any benefit his answers might be to plaintiff, which to any reasonable or rational mind is the result of his numerous visits to the office of the defendant's attorney, but in any event, what he might have thought is no criterion of what Mustell thought, or what precautions Mustell took, be-

cause the law will presume that Mustell was in the exercise of reasonable care in crossing that track; that he looked up and made every observation which he could make to ascertain any apparent danger, regardless of what Cantley might have done in observing or desiring to observe; therefore, it is immaterial what Cantley thought, or what purpose he had in mind, or whether or not, he, Cantley, was reckless or otherwise, as this would not be binding upon the deceased. The Court must presume in the face of this Record, that at the time Mustell was hit by the end of this string of cars, he might have been ten feet away from the standing string of cars, for the reason that Cantley testifies that he cannot tell whether Mustell was one foot or ten feet, and the only reason that he gave the distance which he did give when testifying, was because "they wanted to know, and I said I could not give a definite distance."

On pages 41 and 42 of the Record, he testified as follows:

"Mr. Plummer: Q. And this distance that you have illustrated here a while ago was given to you upon a suggestion by Mr. Albert, wasn't it?

A. I don't know as it was; no, sir.

Q. On the trial of the other case?

A. The only thing, as I said before, I would not swear to the distance, and I won't now.

Q. That is what I say, whether it was one foot or ten feet?

A. No, sir.

Q. But that was done, wasn't it, upon a suggestion of Mr. Albert?

A. Well, the only reason I gave that was because they wanted to know, and I said I could not give any definite distance.

Q. And you wanted to say something?

A. Well, I had to answer the question some way."

Therefore, considering the evidence in the most favorable light to the plaintiff, and the most favorable light would be that he was ten feet away, and so not guilty of contributory negligence in being too close to the car; that this string of cars was struck violently enough to move a distance of ten feet so quickly that Mustell could not get off the track by jumping or using every possible effort to do so, and that Cantley barely escaped with his life.

On page 39, Cantley testifies (Tr. of Record):

"Mr. Albert: Q. Now, you spoke of them moving very quickly. I wish you would describe what you mean by that. (Referring to the string of standing cars.)

A. Well, in kicking as a usual thing, when they kick down—

Mr. Plummer: We object to what is usual."

The Court will see by this testimony, that ac-

ording to Cantley's idea the cars actually were kicked against these other cars. He used the word "kicking," and "when they were kicked down, etc."

This is wholly inconsistent with Farmer's subsequent statement that the cars were being *shoved by the engine going about three miles an hour*. In this testimony, it is also shown by Cantley, "*I could hear the crash of these cars up ahead only at the time they struck.*" He says he never paid any attention to the slack being taken up, but that isn't saying that if the slack had been taken up, that Mustell would not have paid any attention to it, and of course, if the slack had been taken up, it is reasonable to infer that it must have been done one car at a time, and Mustell would have had plenty of opportunity to get out of the way. Again, this witness Cantley, for the purpose of assisting the railroad company, his employer in every manner possible, injects into his testimony the statement, "What is usually done in switching operations" and also testifies that this switching operation was one of the usual and ordinary methods of switching cars, and that this switching operation that killed Mustell was nothing different than was usually carried on in the yards in handling switching operations; and he testifies on pages 77 and 78 of the Record as follows:

"I had observed switching before around those yards in a general way.

Q. I will ask you whether or not there was any difference in the movement of that car at that time than other movements in the yards previous to that."

(Of course this question was asked for the purpose of showing it was an ordinary movement, and the deceased Mustell assumed the risk and he is dead and cannot dispute the witness.)

"A. Not that I know of, in particular. During the period I was with Mustell switch engines were moving around all over the yards without notice or warning to him."

But, the witness evidently forgets himself, and on cross-examination, testifies as follows (Tr. p. 78:)

"Q. Now, Mr. Cantley, you say sometimes you saw men on the end of the cars when they were being shoved down?

A. Yes, sir.

Q. And when they were kicked down?

A. I don't know—

Q. You don't know what the movements were?

A. No, I don't.

Q. What kind of business were you in before you went with Mustell to learn the car checking business.

A. I was material clerk in the store department.

Q. And you had no knowledge about anything about the yards, had you?

A. No, sir.”

Still the defendant has the effrontery and the supreme assurance to offer this man's testimony as an expert witness to the effect that the switching operation that killed Mustell was the usual and ordinary switching operation in that yard, and this, in the face of the fact that Cantley said he didn't see any danger and nothing to indicate danger when he attempted to cross the track with Mustell, and in face of the fact that must be presumed that Cantley himself was not anxious to commit suicide; that if this was the ordinary and usual movement with which he, Cantley, was familiar before the accident, he himself would not be caught unawares as he was and almost crushed to death, the same as was Mustell.

Of course, we will admit that we are criticizing to some extent what might be technically called our own witnesses, but in this kind of a case where the employees of the company are under the thumb, influence and implied threats of the higher officials of these railroad corporations on account of power to discharge and of promotion, and which officers are held responsible for these classes of accidents to the higher officials at headquarters, and considering that we are compelled to use these employees in order to prove to some extent some parts of our case, and where such employees, when they are so tied up that they cannot testify to facts contrary to the statements they have previously

signed in writing without laying themselves liable to prosecution for perjury, nevertheless strain every nerve, and exert their utmost energy to inject into their answers voluntary statements specially favorable to their employer, we have a right to consider them as hostile witnesses. Their very attitude clearly shows that they are in fact present in Court to testify to everything possible, favorable to the Company, whether true or untrue, knowing as they do know, that we are compelled to put them on the stand in order to prove certain important facts in establishing liability, and which they cannot wholly dispute. The Court in interest of Justice, will not hold us bound by voluntary and irresponsible answers of this class of witnesses.

As to what switching operations were being carried out at the time Mustell was killed, we claim there is a direct conflict of the evidence, and we will make a statement of what the defendant claims was the switching operation, which was being carried out at the time Mustell was killed, and then show how this contention on the part of defendant is disputed, by:

1st. The testimony of some of the witnesses.

2nd. The physical facts.

3rd. Circumstances which are inconsistent with the defendant's theory.

Defendant claims that a string of ten or twelve cars was standing on track number 1, tied down,

with brakes set. The engine then shoved another string, composed of eight or ten cars, easterly, and attempted to couple on to the second string of cars, which were standing still; that Mustell was passing over track number 1, on the east end of the original standing string of cars; that when the crew attempted to couple onto the second string of cars on the west end, the two strings of cars came together, but without sufficient force to even cause the "coupling pin to drop." This impact did not move any of the standing string of cars that hit Mustell, and thereafter the engineer pulled the second string of cars backward, or westerly, two or three feet, and then brought the two strings of cars together again sufficient to make the coupling, and then continued on with both strings of cars, killing Mustell. It will be observed that all of defendant's witnesses testified that this engine never moved, and the cars never moved, to *exceed three and one-half miles* an hour before and at the time they hit Mustell, that this was an *ordinary and usual* movement of cars in the yard, of which Mustell knew by his experience in and about the yards; that this movement was not an extraordinary and unusual movement, was not negligent, and if it were such a movement, i. e. ordinary and usual, it was familiar to Mustell, who assumed the risk.

We will admit now that if this sort of a movement of the cars was made in the manner testified to by defendant's witnesses, and with the slowness which said witnesses testified to, then the plaintiff

herein cannot recover, and this judgment should be reversed.

The plaintiff contends that the evidence in this case supports her theory of the switching operations, which is as follows:

That Mustell was crossing the east end of the string of standing cars, at a reasonably safe distance therefrom, considering any apparent or threatened danger, or danger which would result to him from any *usual* or *ordinary* movement of that string of cars; that while said string of cars was standing still, tied down, the switching crew, in some manner, kicked or propelled said second string of cars against the standing string of cars so violently and with unnecessary and unusual force, causing said standing string of cars to be *bumped* back three or four car lengths, and so suddenly that it was impossible for Mustell, being but twenty-three years old and especially active, to get out of the way and escape injury; that the crash of the second string of cars was so violent an impact that the whole standing string of cars moved suddenly a distance of three or four car lengths with the brakes still set; that there was no indication either by usual noise, movement of cars, puffing of engine, or anything else west of the standing string of cars, to indicate to Mustell or Cantley, who was with him, that there was any danger of the standing string of cars moving.

That the jury had a right to consider that if the

cars were moved in the manner which we contend they were moved, that this was not an *ordinary* and *usual* movement, but an extraordinary and *unusual* movement, wholly uncalled for and wholly unnecessary, and the sort of movement that Mustell could not anticipate.

We say that according to the physical facts, and reasoning from cause to effect and considering the direct and circumstantial evidence, there is abundant evidence to support our theory of the way the accident happened and the charge of negligence.

1st. Mustell was a careful employee; he had warned Cantley about being careful while being in and about the cars; he had been warned himself about the danger of the *usual* and *ordinary* switching operations, and he knew of such *usual* and *ordinary* switching operations, and the danger incident thereto. (Record p. 73.) Testimony of Walter Law:

“He (Mustell) could get around pretty good. He was a pretty active man.”

W. F. Kipple instructed Mustell about the danger incident to ordinary switching operations.

Cantley testifies as follows on page 77 of the Record:

“That Mustell warned him about the usual danger of switching operations.”

On page 79 of the Record, Cantley testifies as follows:

“That he didn’t see any indication of any cars coming, and nothing to indicate danger.”

2nd. The first thing that Cantley heard was the crash of the coupling on the west end of the standing string of cars (Rec. p. 39). The smoke of the engine was apparently going straight up (Rec. p. 33). He didn’t see any cars moving on this track (Rec. p. 34). On page 34 of the Record, he testifies as follows:

“Q. What was the first indication to you that cars were moving on that track No. 1, if they were moving?”

A. I heard the crash of the coupling. The end of the car that Mustell and I were passing by at that time moved very quickly. It hit Mustell.

Q. You didn’t hear any taking up of slack or anything of that kind?

Well, I don’t know whether the jury would or not, but I just want to know whether there was any taking up of slack or anything of that kind before the other one moved, or whether as soon as the crash came the car that struck Mustell moved practically the same time.

A. Yes, sir. Sometimes the tracks in the yards are crowded and other times they are not very many cars on them. I did not see these cars come on to these other cars. I looked.”

Thomas D. Farmer testifies on page 45 of the Record, as follows:

“Q. I will ask you if you did not state to Mr. Lavin and myself in our office with reference to this switching, as follows, before the first trial of this case, and that you also testified to it at the last trial of this case: “Just before cars taken in by us reached cars standing on track 1, Foreman Steinhouse ordered me to cut cars off and I did so, and cars struck the cars standing on No. 1, bumping them back four or five car lengths?””

A. Yes, I did.

Q. And is that true?

A. Yes, sir.”

Page 47 of the Record he testifies to the same thing, and as follows:

Q. If it was necessary to move that string of cars four or five car lengths, was there anything to prevent the engine from pushing them on that distance, and then cutting off?

A. No, sir.”

The testimony throughout shows that these yards were being used for all usual yard purposes; that two or three hundred men each day would cross these yards and tracks while switching operations were going on; that numerous employees were working in and about these cars at all times, yet the switching operations were of that character which killed Mustell; that the first sign or indication that anyone heard was when the string of cars crashed into the standing string of cars herebefore referred to, with sufficient force to move the standing string of ten or twelve cars simul-

taneously, before Mustell, who was an active man (page 73 Record) could get out of the way, he, at the time, being in the exercise of reasonable care; and therefore a reasonably safe distance away from said standing string of cars.

Witness for defendant, G. F. Garvin, testifies as follows (Page 94 of Record):

“Q. It would take considerable force, wouldn't it, to send those cars suddenly and violently * * * with that suddenness I have described, wouldn't it?”

A. No.

Q. Wouldn't use much force?

A. No.

Q. Do you pretend to say that could be done, if an engine was going through at 3½ miles per hour?

A. I do.

Q. So that a man could not get out from behind it?

A. *No, I would not say that.*”

This witness also testifies on the same page that there was about two feet of slack between each car.

On page 92, testimony of Garvin, it says (Cross-examination, MR. PLUMMER):

“I heard Mr. Gebhart's description about switching operations that were done at the time this man was killed, and I answered that I had seen this kind of similar operation. I think I based that upon the facts that Gebhart testified it was going only about 3 or 3½ miles an hour.”

“Q. That is the usual custom, isn't it?

A. About that.

Q. In other words, the custom in handling these cars is about the speed testified to by Gebhart?

A. That is generally about the speed.”

Now, we contend that if the string of cars was being moved at the rate of only three or three and a half miles an hour, it would have been impossible for Mustell to have been caught and killed; at least the jury had the right to consider the reasonable probability of him being killed in such a switching operation, considering that he was exceptionally careful, knew the dangers incident to that kind of switching operation; that he was at the time, a reasonably safe distance from the end of said string of cars, and that Henry Cantley, a young boy especially active, and who was further away from the end of the cars than Mustell, had barely time to jump and escape with his life. We say that the physical fact that this string of cars moved so suddenly as it did move, and simultaneously, and also the fact that the engine was apparently standing still when this crash was heard, the smoke going straight up, and the crash being of sufficient violence to move this large string of cars with the brakes set a distance of four or five car lengths, is wholly inconsistent with defendant's theory that this switching operation was simply a *shoving of cars*; that the first time the second string of cars came together with the stand-

ing string of cars that it did not strike hard enough to cause the pin to drop; that none of the standing string of cars moved at all at that time; that the engine then backed up about two or three feet and again coupled onto the standing string of cars and continued shoving the cars at the rate of three or three and a half miles an hour.

Every sane person, whether he is an engineer, railroad man, or whatever employment he may be in, knows that it is a physical impossibility for an ordinary switch engine, having a distance of only two or three feet to run, starting from a standstill and going only a distance of two or three feet, to move a string of ten or twelve cars, standing still and tied down with brakes, with sufficient violence to make the whole string so suddenly move while running at three miles an hour (about as fast as a man could walk), as to almost kill two men who happened to be passing at the west end of said string of cars, and the jury would have a right to consider these physical facts, and reason from cause to effect, in demonstrating the utter improbability that such a switching operation, as claimed by the defendant, was being carried on. And, considering these physical facts also, with the original statement made by witness Farmer, we say there is abundant evidence to take the case to the jury on the theory of an extraordinary and unusual switching operation, the character of which could not have been anticipated by the deceased, Fred Mustell. The cases cited in the brief of defendant

are cases where the *usual* and *ordinary* switching operations are being carried on, and not unusual and extraordinary movements of cars, and those decisions only hold what we concede to be the law, that a man working in the yards of a railway company assumes the risk of injury from any *usual* and *ordinary* movement of cars which he had notice, or in the exercise of reasonable care, he ought to have had notice of or should have anticipated. That is as far as any of the decisions go, and the converse rule must be admitted to apply to cases, where the movement is *unusual and extraordinary* and the employee does not assume the risk of injury from that sort of movement.

It seems to us that the claim of "assumption of risk" has no place in this case, for the reason that if the movement of the cars was *not unusual and extraordinary*, then it was not negligent, and the deceased would have assumed the risk of such an ordinary and usual movement, and for the Court to hold that Mustell assumed the risk of injury from the particular movement which the jury had a right to find *was actually made*, then it must hold as a matter of law that said switching operation was *not* an extraordinary and unusual movement, and that no two reasonable minds could differ on that subject.

On the question of assumption of risk, this Court has laid down the law, which is concurred in by all of the Courts in the case of Williams vs. Bunker

Hill & Sullivan Mining and Milling Company, case No. 2110, decided October 7th, 1912, and reported in 200 Federal 211, 118 C. C. A., page 397, which was a writ of error sued out in this same District Court as the case at Bar. We do not like to burden the Court with a resume of all the evidence in the Record, and as the Record is very short, we assume the Court will probably read it all, therefore, we have refrained from repeating same in our brief excepting sufficient to prove to the Court that the jury had a right to find from the evidence that it was not necessary or usual to make the violent movement of these cars that was made, and if it were necessary to move them up four or five car lengths, that the same could have been shoved slowly and without danger to Mustell at a speed of about 3 miles per hour, as was usual (Rec. p. 92, witness Garvin), and therefore, it being unnecessary, it was not done for that purpose. If it was not done for that purpose, then the driving in on number 1 track of a string of eight or ten cars with sufficient speed and force to strike a standing string of cars with such extreme violence (considering the fact that numerous men were in and about those cars in the performance of their duties, at all times), we think was gross negligence, wholly uncalled for and inexcusable. Switching crews know that men are constantly in and about these cars and through the yards in the performance of their duties, in which their minds are absorbed, to more or less extent, and cannot always see just what

is going on, but they usually have an opportunity to get out of the way of danger which may result from the *usual* and *ordinary* switching operations, and to carry out a movement of cars as this was carried out is certainly almost criminal negligence.

Counsel contend and insist that Mustell was only two or three feet away from the end of the car when he was hit. We say the evidence is uncertain as to this distance; in other words, the jury could not find as a fact just what distance Mustell was from the end of the car. Cantley does not know, but tried to estimate from memory, and declares that he cannot tell how far, whether it was "one foot or ten feet;" therefore, his testimony on that subject, being of such uncertain and unsatisfactory character for the purpose of establishing distance, the jury has the right to indulge in the presumption of law (inasmuch as Mustell is now dead, that he was an extraordinarily careful and active person), that he was not guilty of negligence, and therefore was passing said string of cars at a reasonably safe distance therefrom, considering the *usual* and *ordinary* movement of cars in said yard, and if he was caught and killed while exercising said care, it is a reasonable inference that it was on account of the extreme and extraordinary quick movement of the whole string of cars, which he could not anticipate and of which he had no notice of warning.

Another fact is apparent by the Record, and that is that the engineer who operated that engine was not called and sworn as a witness by the defendant;

neither was his absence accounted for, and it is a reasonable inference to be drawn from such facts that if he was called and sworn, he would testify adversely to the contention of the Company.

We say, therefore, in all sincerity, that the evidence produced by the plaintiff, including the favorable evidence brought out on cross-examination of the defendant's witnesses, together with the presumptions of law to be indulged favorable to the deceased, and all of the reasonable inferences to be drawn from the evidence, that the jury were fully warranted in finding as they did find, by their special verdict:

“1st. Question. Were the cars that struck Mustell moved in a manner extraordinary or unusual?

Answer. Yes.

2nd. Question. Did Mustell assume the risk?

Answer. No, unusual risk.

3rd. Question. Was the negligence of Mustell the sole cause of his death?

Answer. No.”

All of which is respectfully submitted.

PLUMMER & LAVIN,

Attorneys for Defendant in Error.

United States Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY
COMPANY (a corporation),

Plaintiff in Error,

vs.

GRACE MUSTELL, as administratrix of
the estate of Fred G. Mustell, deceased,
and as the personal representative of
said Fred G. Mustell, deceased, for and
on behalf of Grace Mustell and Ruth
Mustell, the widow and minor child,
respectively of said Fred G. Mustell
deceased,

Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court for the
Eastern District of Washington, Northern Division.

CHARLES S. ALBERT,

THOMAS BAUMER,

P. O. Address: Great Northern Passenger Station,
Spokane, Spokane County, Washington.

Attorneys for Plaintiff in Error.

Filed

~~Filed Feb 11 1915~~ — day of February, 1915.

F. D. Monckton,

FRANK D. MONCKTON, Clerk.

By

Deputy Clerk.

No. 2509

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Eastern District of Washington, Northern Division.

The brief of the attorney for defendant in error, hereinafter referred to as the plaintiff, is based not so much upon the facts as disclosed by the evidence

as upon the theory of plaintiff's case, which he had hoped to prove upon the trial, and did not. The statements made in his brief of what he claims the evidence showed are made in an effort to befog the testimony by claims, and thereby cause the court to say that there was substantial evidence to go to the jury on the issues of the character of the movement and the assumption of risk.

The brief of the plaintiff in error, hereinafter referred to as defendant, quotes all the evidence relating to the questions raised, while that of the plaintiff not only leaves out important parts of the testimony, but consists mainly in abuse and misstatements relating to the plaintiff's own witnesses.

The "Statement of the Case" by plaintiff contains statements, which, to say the least, ought to be considered in the light of the evidence in the case. We quote in italics these statements, and immediately after quote the evidence relating to them, which will show that the statements are not based upon fact.

Plaintiff's counsel says that Cantley and Mustell were "*passing through that part of the yard through which it was usual and customary to pass on such occasions. In doing so it became necessary for him to cross over Track No. 1.*" (Brief Defendant in Error, p. 4.)

His own witness Cantley on cross-examination testified with reference to the usual way:

“Q. Mr. Plummer asked you about the usual way in which you crossed there at this particular point. Do you recall any other time that you ever went over at that particular point before?”

A. Well, we never paid any particular attention to the particular parts where we are going when we are busy.

Q. You go back and forth across the tracks anywhere you want to, don't you?

A. Yes, sir.

Q. You go up and down in between the tracks or did at that time wherever you wanted to?

A. Yes, sir.

Q. You and Mustell and these other employes,—well you and Mustell, that is right, isn't it?

A. Yes, sir.

Q. What do you mean by saying you went the usual way across there, Mr. Cantley?

A. Well, just a way to get to the depot out on the main line and up the main line.”
(T. 41.)

“*In doing so it became necessary for him to cross over Track 1.*” (Brief Defendant in Error, p. 5.)

“Q. And in walking you could have walked if you and he wanted to between Tracks 1 and 2 without any difficulty, isn't that a fact?”

A. Yes, sir.

Q. And you could have gone up to the lead and walked along the lead and walked across right at the depot?

A. Yes, sir.

Q. Without crossing anything out there to the main line, isn't that right?

A. Yes, sir.

Q. And there was plenty of room between the two tracks, tracks 1 and 2, between any one of those tracks 4 and 5, or 4 and 3, and so on, for you to have walked up there if you had wanted to?

A. Yes, sir."

(Cantley's testimony on cross-examination as plaintiff's witness, T. 40.)

"Upon which was standing perfectly still, tied down by brakes, a string of sixteen box cars."
(Brief Defendant in Error, p. 5.)

This statement is an attempt to mislead the court into believing that all of the sixteen box cars were tied down. This idea is attempted further later in plaintiff's brief.

"We had about ten cars in on No. 1 Track, and the field man, Mr. Miller, set three brakes, enough to hold the cars in far enough, so that we could project some more against them."

(Testimony of Steinhouse, the switch foreman, T. 75.)

"Mustell and Cantley attempted to cross said Track No. 1 a reasonably safe distance from the end of said string of cars, the distance being anywhere from one foot to ten feet." (Brief Defendant in Error, p. 5.)

There is not the slightest evidence that the distance which they were from the end of the car "was a reasonably safe distance". Cantley in testifying for the plaintiff on cross-examination said the dis-

tance was “well, about three or four feet, somewhere along there; I wouldn’t be positive”.

“Q. You think it was as far as from the arm of the chair to the corner there?”

A. Yes, sir.”

This distance was found on measurement to be two feet. (T. 38.)

He said he would not *swear* to the distance, whether it was one foot or ten feet. (T. 41.)

“I testified on the other trial substantially as I did here that the distance was about so much, between two and three feet, and at that time I said the distance was from two feet up, I couldn’t tell exactly.” (T. 42.)

A. Thomas, a car repairer working in the yards testified:

“I didn’t see the car hit him, but he was very close to the car the last I seen of him. He was coming up through the yard and went to cross over from track 5, over towards the main line. He and Mr. Cantley came up through the yards, apparently not paying a great deal of attention to where they were going or anything.

* * *

Cross-Examination by Mr. Plummer.

Q. Didn’t make any note of how far he was from the car, or anything about it did you?

A. Well, he was crossing,—well, I started to say that he was starting to cross pretty close to the car. When we are working in the yards and see anyone close to the cars we generally notice it.” (T. 83.)

“*There was nothing to indicate to Mustell or Cantley that any cars were being kicked down upon*

the standing string of cars." (Brief Defendant in Error, p. 5.)

"Q. When you got close to track 1, state whether or not you saw any indication of any train or cars or backing against this string of cars that caught Mr. Mustell, or anything to indicate that anything was being moved on that track No. 1 in the direction of this string of cars that struck Mustell.

A. Well, as we were crossing there we were not paying particular attention to that.

Q. I didn't ask you that, Mr. Cantley, I am asking you if you saw anything?

A. I can't say that I did or did not, because we were not paying any attention."

Cantley's
(Mustell's direct examination, plaintiff's case, T. 32, 33.)

"The smoke of which engine was going straight up, which indicates to any rational person that the engine must have been standing still." (Brief Defendant in Error, p. 5.)

"Just before crossing I glanced up that way and saw an indication where the switch engine was by the smoke. I just saw the smoke coming out of there. I supposed out of the engine up there * * *

Well, it was going apparently straight up * * *

Q. When the smoke is going straight up, what does that indicate, according to your experience there in the yard with reference to the engine standing still or going?

A. Well, I don't know; I can't very well say because sometimes when they are working

hard they go straight up, and other times they don't."

(Cantley's testimony, direct examination for plaintiff, T. 33.)

However, in spite of this contradiction of his theory, plaintiff's counsel argues that "*the movement of the engine could be determined by the smoke and puffing, providing the engine was shoving a string of cars with it, but if the string of cars was kicked in, the engine would still remain standing at the point from which the kick was made and the smoke would go straight up as it did.*" (Brief Defendant in Error, p. 5.)

When a kick is being made he could just as well argue that the engine would follow after the kick, or would run away from the cars or would stand still. In other words, he could not tell from the smoke, that it was standing still and there is nothing in the evidence to indicate from Cantley's testimony whether the engine was shoving, kicking or pulling the cars.

"*If a string of cars were kicked in on the string that was standing still that hit Mustell, in the ordinary manner, or in a reasonably careful or usual manner, it would take up the slack of the standing string of sixteen cars, which would give Mustell sufficient warning.*" (Brief Defendant in Error, p. 6.)

This is a conclusion or inference which plaintiff's counsel would like to draw. This theory, which is

not based on testimony,—is refuted by the only testimony in the case upon the subject, that of Mr. Garvin, who testified that with an engine going three or four miles an hour, the far car would “run away with the impact”.

“Q. What is the movement of the end car?

A. The end car, it starts very suddenly, the spring pressure goes up first before the car moves and then when it moves it moves suddenly. That is the usual occurrence when you are coupling.”

(Garvin’s testimony on direct examination for defendant, T. 92.)

On cross-examination he testified:

“Q. Now if you were passing across the end of a car and you would hear the crash as the cars came into the end of the string, and immediately the head car moved very violently and very suddenly, and you did not hear any continuation of the coupling, taking up of that slack, then you would say the slack was out, wouldn’t you?

A. I would say the slack was up. That would be in.

Q. It would take considerable force, wouldn’t it, to send those cars suddenly and violently, turn cars on that track, with that suddenness I have described, wouldn’t it?

A. No.

Q. Wouldn’t use much force?

A. No.

Q. Do you pretend to say that could be done, if an engine was going through at 3½ miles an hour?

A. I do.

Q. So that a man couldn’t get out from behind it?

A. No, I would not say that. I say it moved that way, moved violently, I say, because the slack is there and the very minute the forward car moves the hind one has got to move.” (T. 94.)

“*The movement of the standing string of cars was caused by another string of cars being thrown in on Track No. 1.*” (Brief Defendant in Error, p. 6.)

There is not a particle of evidence to approach a foundation for such a statement. This feature of the case is fully covered upon pages 29 to 34 of the brief of plaintiff in error by direct quotations from the testimony. From these quotations it conclusively appears, without a particle of testimony to contradict it, that a string of cars was switched in onto the track upon which a string was already placed; that they intended to move the string already there three or four car lengths, to put them where they were afterwards placed; that they did not make the coupling at first and did not move the string of cars, and they pushed on back, made the coupling in the usual manner, and that the end car moved quickly as it would do when a coupling was made, and that “they shoved the cars down three or four car lengths”.

“*No bell or other signal was given.*” (Brief Defendant in Error, p. 6.)

“Mr. ALBERT. There is one phase of this case that I don't know whether there is going to be

any claim on or not; I did not notice any evidence introduced in plaintiff's case with respect to it, and that is with reference to the question of bell or whistle signals. Do you make any claim on that, Mr. Plummer?

Mr. PLUMMER. Certainly. We claim you ought to have a *rule* or some manner of warning, and you didn't have any.

Mr. ALBERT. There is no claim there was any custom in the yards as to bells and whistles.

Mr. PLUMMER. I don't know anything about that, whether there is or not. *We have not offered any proof to show any custom as to bells and whistles.* I will say that the only thing we will claim with reference to bells and whistles is that if they had been given, it would have tended at least to warn plaintiff of the imminence of his danger. We have not offered any proof to show that it was customary to ring a bell or that it was not, but we do insist that that is one of the ways that a rule could have been prepared to give warning." (T. 72.)

(4) Was the defendant negligent in failing to provide a rule for the warning of employes such as Mustell?

Answer: No.

(Special Findings of Jury, 23.)

The *Ryan* case in 53 Wash. 279; 101 Pac. 880, quoted from on page 49 of brief of plaintiff in error, holds specifically that it is not necessary to ring bells or give other signals in such operations in freight yards.

The so-called STATEMENT OF THE CASE prepared by plaintiff's counsel, has been demonstrated, we believe, to be utterly unreliable, and prepared with

a deliberate attempt to make claims of evidence, which evidence does not in fact exist, solely for the purpose of getting the court to take the position that because of such claims, there must be some conflict which could have taken the case to the jury. In our brief we quoted all of the evidence relating to the questions raised, and we respectfully refer the court to these quotations and statements thereof, contained therein, and to the transcript, for the consideration of the court in determining the questions here involved.

The argument of counsel for the plaintiff is based in the very first instance on a false premise. He says that the motion for directed verdict was thoroughly argued before Judge Rudkin. The record on page 95 of the transcript shows exactly what occurred on the submission of the motion to direct a verdict; that the motion was made, and the court said:

“I think I will let the case go to the jury, and you can have my ruling reviewed by the Circuit Court, or I may review it myself on application.” (T. 95.)

The order made on the motion for judgment distinctly states that it was not argued. (T. 105.)

Counsel has seen fit to go outside of the record. He says: “This case was partly tried in the Superior Court of Spokane County, and upon plaintiff’s motion a voluntary nonsuit was granted and suit brought in the federal court.” It *was* tried in

the state court, and at the end of the evidence defendant moved for a directed verdict. *The court stated that no negligence had been proven*, and then plaintiff moved for a voluntary nonsuit, which the defendant was powerless to prevent. Plaintiff then took the case out of the court in which it had been determined that the defendant was not negligent, and brought it in the federal court, to take a chance that he could prevail upon the judges of this court to hold contrary to the state court that he had established a case of liability.

As we anticipated, plaintiff has attempted to discredit the testimony of the only witnesses called to prove the case against the defendant. These two witnesses, Cantley and Farmer, were subpoenaed by the plaintiff and the defendant both. Both of them talked with the attorneys for each of the parties. Plaintiff's counsel says that he took a statement from Cantley. The record discloses no such statement. It certainly was not offered on the trial. The statement taken by the attorney for the plaintiff from Farmer was offered by *defendant* in evidence. This statement is identical with the testimony given by him upon the trial. Six different times the witness testified that the cars were first coupled up, run about a car length and that a cut was then made, the cars continuing for a distance of about four or five car lengths in all. (T. 43, 48.) This testimony is fully discussed in the brief of the plaintiff in error. (pp. 33-37.)

The effort on the part of the respondent to confuse and mislead the court is shown by quotations from Farmer's testimony on page 11 of his brief. The quotation as made in the brief would indicate that the testimony is consecutive, and that all that Farmer testified to could be found as quoted in that brief. He omits to quote the statement made on the same page of the transcript, "the sequence of how these things happened was when we were backing in just before we coupled on the other cars, Mr. Steinhouse told me to cut the cars off at a certain place, which I went to do, and before I got to where the coupling was they coupled up and I pulled the pin. That there is where you get 'just before' in that statement. It was not meant just before the cars were coupled that I cut them off." (T. 47.)

"The cars ran down upon their own momentum, striking the sixteen cars." (Brief Defendant in Error, p. 11.)

This is shown by all of the testimony not to be the fact. (See Plaintiff in Error's Brief, pp. 18, 19, 20, where all the testimony relating to the movement is fully referred to.)

Plaintiff predicates his entire claim of negligence on this question and answer:

"Q. If it was necessary to move that string of cars four or five car lengths, was there anything to prevent the engine from pushing them on that distance and then cutting off?

A. No, sir."

The evidence of every witness in the case shows that the engine was not cut off until after the train had moved a car length, which was after Mustell had been hit, and therefore the cutting off of the engine, as an element of negligence, is entirely out of the case. (T. 75, 44.) Furthermore, their own expert witness O'Brien, testified that it was proper railroading to kick them after you coupled into them, and send them four or five car lengths (T. 62), which is just what plaintiff claims was done in this case.

Counsel argues that according to Cantley's testimony the cars were kicked in. If, as they say, he knew it, then he knew it by observation before the collision, and he must have observed this movement, up at the head end before the cars came together, which would have given them both plenty of time to have gotten out of the way, and would have notified them of the danger which plaintiff claims existed by reason of the kicking. However, Cantley testified directly that there was no difference in the movement of that car at that time than other movements in the yards previous to that. (T. 78, 80.)

It makes no difference, however, whether the cars were shoved or kicked, as the effect of a shove or kick upon the end car or the car which was nearest Mustell would be precisely the same. The impact of the coupling made for either purpose, shoving or kicking, would be exactly the

same, and would cause the car nearest Mustell to move suddenly, by reason of the springs in the couplings. The testimony is conclusive, and without contradiction, that an engine making the coupling for either a shove or kick, going at three and one-half or four miles an hour, would cause the end car to move suddenly; that the very moment the forward car moves, that is the car which is being coupled up, the hind car has got to move. (Testimony of G. F. Garvin, T. 92-95.) So that the entire attempt to discredit his own witnesses is without avail, for, even assuming that the cars were kicked in, as plaintiff's counsel claimed, the effect upon the end car would be precisely the same as when shoved in, and counsel admits, in effect, in his brief upon page 22, that if that be a fact, the judgment should be reversed. This attempt to discredit his own witnesses, Cantley and Farmer, is made for the purpose that if such discredit be shown, it might be claimed that it was a question for the jury to say whether they should be relieved or not, and if not, whether the jury ought to believe something that they had not testified to. We have known of no court upholding such a contention. The effect of such a holding would be that a verdict could be predicated, not upon the evidence introduced, but upon a lack of evidence which was necessary to plaintiff's case.

The alleged foundation of this discredit is a pre-supposed duress of an employer upon employes, not shown to be a fact by any evidence in the case.

It was not the fact, and there is no evidence to show it, upon which any claim to that effect can be based, that the witness Farmer was an employe of the defendant when the case was tried. Counsel for the plaintiff knows this, and his attempt to convey that impression to the court throughout the entire discussion of the case in the brief, is made purely and solely for the purpose of confusing and misleading the court.

This purpose is again shown on page 25 of his brief. He attempts to convince the court that this was an extraordinary and unusual movement, by pretending to quote from the testimony of Cantley with reference to the manner in which it occurred. If the court will take the testimony quoted on page 25 of the brief of defendant in error, and compare it with the testimony as found upon page 34 of the record, from which it is pretended to be quoted, it will find that this very important question and answer were omitted, and from the context appears to have been omitted intentionally.

“MR. PLUMMER. Q. Just state the relation between the coming together of the string of cars onto the cars that were standing still that you say you heard the crash,—the relation between the crash and the movement of this car that hit Mustell; what I want to get at is whether or not it was simultaneous or otherwise.

A. Well, it moved very quickly afterwards, *you know how it would be when a coupling is made, how quickly the cars would move.*”

Counsel attempts to make a point of the fact that the witness Garvin testified that the cars being

coupled with an engine going $3\frac{1}{2}$ or 4 miles an hour, would move suddenly and violently.

“Q. So that a man couldn't get out from behind it?

A. No, sir, I wouldn't say that.”

Of course, he wouldn't say that, if the man who was behind was at an absolutely safe distance from the end of the car, for instance, if he was thirty or forty feet or a car length away. This man was within three or four feet of the car end, and was noticed by one man who testified that he was very close to the car, the last he saw of him, so close that he took particular notice of him. (T. 82, 83.) Furthermore, counsel omitted in his quotation to cite the rest of the evidence, which was part of the same testimony, “I say it moved that way, moved violently, I say, because the slack is there and the very minute the forward car moves the hind one has got to move” (T. 94), showing that a violent and sudden movement must be expected when a coupling is made, regardless of whether the movement is a kick or a shove.

That Mustell was “exceptionally careful”, a statement made by plaintiff's counsel, has no foundation in the evidence, and is a pure figment of counsel's hopeful imagination. His indulgence in the alleged presumption that “inasmuch as Mustell is now dead, that he was an extraordinarily careful and active person” has no basis in any decision of any court. Any presumption that Mustell was in the exercise of due care is overcome by the actual

facts shown at the trial that he was well acquainted with the movements in the yard; that this movement was an every day occurrence during the four years that he was there; that when cars were coupled, shoved or kicked, the end cars moved suddenly by reason of the springs in the coupling and the impact, just as these cars did, and that knowing these facts he walked within three or four feet of the end of the car, without paying any attention to what was going on, and when his attention was not engrossed in his work.

As a final attempt to throw dust in the eyes of the court, counsel for plaintiff below says that because the engineer was not called it must be inferred that his testimony would have been unfavorable to the defendant. As to just what particular point this inference is to apply, he does not say. What could he have testified to that was not already testified to by other witnesses? He was down at the other end of the train, which according to the claims made by counsel for the plaintiff was from 16 to 26 cars from where the accident occurred, a distance of from two to four blocks. Mustell's companion testified directly to what occurred at the point of the accident. Thomas who was the other of the eye witnesses also testified as to that. The field man who was close to him; the man who followed the engine; the switch foreman, the fireman, the general yardmaster and the assistant yardmaster all testified as to the manner in which the switch was made, the movement, the force used, the

speed of the cars and engine and the effect thereof, and every possible thing that the engineer could have testified to. We are frank to say that it never occurred to us, in view of all of this evidence, that it would be necessary to cumulate it by the engineer's testimony, in order to save ourselves from the insinuations contained in plaintiff's brief.

But this claim of counsel illustrates the sole basis upon which this case is appealed. It is not what the evidence shows, but what counsel failed to show that he desires this court to support a judgment on.

The case of *Williams v. Bunker Hill & Sullivan Mining and Concentrating Co.*, 200 Fed. 211, is directly in point in determining that this case is one in which Mustell was shown to have assumed the risk. In that case the danger was a concealed one. In this case the attention of Mustell had been expressly called to the danger by Kipple (T. 84), who testified about the danger of approaching trains in the yards, movements on the track, trains moving at any moment, and to always keep clear of them, and his own instructions given to Cantley the very morning of the accident, to be careful about climbing on cars: **“that they were liable to switch there most any time and kick a bunch of cars in there, and I would get hurt at it”** (T. 77) clearly shows that he had appreciation of the danger referred to in the *Williams* case and in the *Butler* case, quoted therein. The testimony is uncontradicted that they shoved and coupled cars in the yards, and that these

movements were taking place every day, continually all day long on the tracks, during all the time that Mustell had worked there for four years, that the cars would move quickly and suddenly, and that this method of operation had been constant during all that time.

In the language of the Supreme Court in the *Butler* case:

“Where the conditions are constant and of long standing and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff’s own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly.”

Butler v. Frazee, 211 U. S. 459; 29 Sup. Ct. 136; 53 L. Ed. 281.

Respectfully submitted,

CHARLES S. ALBERT,

THOMAS BALMER,

Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SWAYNE & HOYT, Inc., a Corporation
PLAINTIFF IN ERROR

vs.

GUSTAV BARSCH
DEFENDANT IN ERROR

Transcript of Record

Upon Writ of Error to the District Court of the
United States for the District of Oregon

Filed

OCT 31 1914

F. D. Monckton,
Clerk.

No.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SWAYNE & HOYT, Inc., a Corporation
PLAINTIFF IN ERROR

vs.

GUSTAV BARSCH
DEFENDANT IN ERROR

Transcript of Record

Upon Writ of Error to the District Court of the
United States for the District of Oregon

INDEX OF PRINTED TRANSCRIPT OF RECORD

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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IN THE
District Court of the United States

FOR THE DISTRICT OF OREGON

November Term, 1913

GUSTAV BARSCH,
Plaintiff,

v.

SWAYNE & HOYT, INC.,
a Corporation,
Defendant.

Be it remembered, that on the 21st day of January, 1913, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to wit:

COMPLAINT

Plaintiff above named, for cause of action against the defendant above named, complains and alleges:

I.

That said defendant now is and was during all the times herein mentioned, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California, and as such, by and through its agents, was doing business in the City of Portland, Multnomah County, Oregon, during said time.

II.

That said plaintiff, with others, on or about the 31st day of March, 1913, about 7:30 p. m. of said day, was employed by and was working for Swayne & Hoyt, Inc., said defendant, in assisting to unload structural iron beams about 18 feet long and weighing about 800 pounds each, from the steamship "Camino" onto a truck on the dock, and, after the same were landed upon said truck, in taking them away and storing them on the dock.

III.

That during the times herein mentioned, said steamship was berthed at a dock in the Willamette River, in Portland, Multnomah County, Oregon, and that said steamship and its tackle, apparel, furniture and machinery hereinafter referred to and mentioned, were in possession of and controlled by said defendant for the purpose of unloading said iron; and while the defendant and said plaintiff were unloading said structural iron beams, they were doing it by means of a double winch which was operated by steam power and which was located upon the deck of said ship, by an engineer and a foreman in the employ of said defendant, booms, cables, falls, hooks, and slings. That in unloading said vessel, said sling and fall were fastened, by means of a hook, to each end of said structural iron beams, which said sling and fall were fastened or connected with a cable which wound around the

drum of said steam winch, and then said beams were raised by means of said steam winch and apparatus from the deck of said steamship into the air and lowered over the rail of said ship down to and onto a truck on said dock, where said plaintiff and his fellow servants would receive, unloosen and place said beams upon said truck, and then remove them out of the way for the next load, and store them away upon said dock. That said work in which said defendant was engaged involved a risk and danger to the life and limb of said plaintiff and his fellow employees. That from the position he occupied on said vessel, the engineer operating said steam winch was unable to see plaintiff and the men while they were working on the dock at the time of the accident hereinafter set forth. That for the purpose of unloading said ship properly, safely and without risk or danger to the men working on the dock, it was necessary and the duty of defendant to employ a hatch tender or signal man to signal from the men working on the dock to the engineer operating the steam winch.

IV.

That at said time and place, said plaintiff and his fellow workmen had received upon a truck upon said dock one of said iron beams, and said plaintiff, whose duty required him to so do, took hold of said beam, which was unhooked on one end, for the purpose of steadying it and in order that the same could be successfully released from

said hook, cable and sling, when the foreman of said defendant, carelessly and negligently and in his haste to unload said ship, gave the signal to engineer to go ahead before he was notified by the men who were handling the load on the truck, to do so, which the said engineer did without any notice to plaintiff or his fellow workmen, and said beam was suddenly and unexpectedly raised and with great force and violence struck plaintiff on the left knee and knocked him down, cut a chunk out of the index finger of his left hand, and permanently injured and bruised his knee joint and the tendons and ligaments thereof and the bone of the knee, in consequence of which said plaintiff suffered great pain and mental anguish, rendering him unfit to work, and will so suffer in the future, and he is permanently incapacitated from earning a living and following his vocation, to his damage in the sum of \$10,000.00.

V.

That it was the duty of the defendant to furnish said plaintiff a safe place to work and to keep the same in a reasonably safe condition, and to furnish a system of communication by means of signals, so that at all times there might be prompt and efficient communication between the employees working on the dock and the engineer who was operating the steam winch, which it was necessary to do for the safety of plaintiff and the men working with him.

VI.

That said injuries were particularly caused by the negligence of defendant in failing to furnish plaintiff a safe place to work and in failing to keep same in a safe condition, and in failing to furnish a system of communication by means of signals at said time and place so that at all times there might be prompt and efficient communication between the employees working on the dock and the engineer operating the steam winch on the deck of said ship, which it was necessary to do for the safety of plaintiff and the men working on the dock, in that said defendant failed to furnish a hatch tender or signal man to communicate signals between the men working on the dock and said engineer, and a person to notify or signal the engineer when to lower or raise the load or land the load, and to signal the engineer when and how to raise, lower or hold the load to prevent the same from striking or injuring said plaintiff and the men working on the dock, and to communicate the signals from the men working on the dock to said engineer who was operating the steam winch; and also on account of the foreman's signaling the engineer to go ahead before he was notified by the men who were handling the load on the truck to do so; and also for the reason that said engineer was so stationed at the time of said accident that he was unable to see the men working with the load on the dock and to know when to go ahead or let go on the load.

VII.

That on the 31st day of March, 1913, plaintiff was a strong, healthy, active man, aged 49 years, working as a longshoreman and earning more than \$100.00 a month, and had a life expectancy of 21.63 years.

Wherefore, plaintiff demands judgment against said defendant for the sum of \$10,000.00 and the costs and disbursements of this action.

Giltner & Sewall,
Attorneys for Plaintiff.

Duly verified.

Duly filed.

And afterwards, to-wit, on the 10th day of February, 1914, there was duly filed in said court, an answer in words and figures as follows, to-wit:

ANSWER

(Title of Court and Cause.)

Comes now Swayne & Hoyt, Inc., defendant above named, and for answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I.

II.

Denies the allegations of Paragraph II.

III.

Admits that during the times mentioned in plaintiff's complaint the steamship "Camino"

was berthed at a dock in the Willamette River in Portland, Multnomah County, Oregon, and denies all knowledge or information sufficient to form a belief as to the methods used in unloading the said steamship and the cargo therefrom, and the methods used by the plaintiff and his fellow servants in receiving and placing the said steel beams about the dock; and otherwise defendant denies each and every allegation of Paragraph III.

IV.

Denies all information and knowledge sufficient to form a belief as to the allegations contained in Paragraph IV, and the defendant specifically denies that plaintiff is permanently incapacitated from obtaining a living, or that plaintiff has suffered great pain or mental anguish, or that plaintiff has suffered serious injuries of any kind whatsoever, or damage in the sum of ten thousand dollars, or any other sum.

V.

Denies the allegations of Paragraph V.

VI.

Denies each and every allegation of Paragraph VI.

VII.

Denies all knowledge or information sufficient to form a belief as to the allegations of Paragraph VII.

Wherefore, defendant having fully answered plaintiff's complaint, demands judgment against

plaintiff for its costs and disbursements in this cause incurred.

Snow & McCamant, and
Geo. B. Guthrie,
Defendant's Attorneys.

Duly verified.

Duly filed.

And afterwards, to-wit, on the 12th day of May, 1914, there was duly filed in said court, a verdict in words and figures as follows, to-wit:

VERDICT

(Title of Court and Cause.)

We, the jury in the above entitled action, find in favor of the plaintiff, Gustav Barsch, and against the defendant, Swayne & Hoyt, Inc., a corporation, and assess the damages in favor of plaintiff in the sum of fourteen hundred dollars (\$1400.00).

Signed May 12, 1914.

John Hall,

Duly filed.

Foreman.

And afterwards, to-wit, on Tuesday, the 12th day of May, 1914, the same being the 62nd judicial day of the regular March term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

JUDGMENT

(Title of Court and Cause.)

Now, at this day, come the parties hereto by their counsel as of yesterday, and the jury im-

paneled herein being present and answering to their names, the trial of this cause is resumed and the jury having heard the evidence adduced, the arguments of counsel and the charge of the court, retire in charge of the proper sworn officers to consider of their verdict; and thereafter said jury return into court the following verdict: "We, the jury in the above entitled action, find in favor of the plaintiff, Gustav Barsch, and against the defendant, Swayne & Hoyt, Inc., a corporation, and assess the damages in favor of plaintiff in the sum of fourteen hundred dollars (\$1400.00), John Hall, Foreman, Signed May 12, 1914," which verdict is received by the court and ordered to be filed; whereupon it is considered that said plaintiff do have and recover of and from said defendant the said sum of \$1400.00, together with its costs and disbursements herein taxed at \$60.00, and that execution issue therefor.

And afterwards, to-wit, on the 26th day of May, 1914, there was duly filed in said court, a motion for new trial in words and figures as follows, to-wit:

MOTION FOR NEW TRIAL

(Title of Court and Cause.)

Comes now the defendant, Swayne & Hoyt, Inc., and moves the court for an order setting aside the judgment and verdict heretofore rendered in this cause and granting unto the defendant, Swayne & Hoyt, Inc., a new trial, which said motion is based on the following reasons:

I.

On account of surprise which could not have been guarded against by the exercise of ordinary prudence on the part of defendant in the matter of testimony offered in evidence by the plaintiff as is more particularly shown by the affidavit of Zera Snow of defendant's attorneys, which affidavit is hereto appended and made a part of this motion.

II.

On account of the insufficiency of the evidence to justify the verdict and for the further reason that the said verdict is against the law.

III.

On account of excessive damages granted by the jury in its verdict, which damages appear to have been given under the influence of passion or prejudice.

IV.

On account of errors in law occurring at the trial and excepted to by the defendant.

Snow & McCamant, and
Geo. B. Guthrie,
Attorneys for Defendant,
Swayne & Hoyt, Inc.

And afterwards, to-wit, on Monday, the 8th day of June, 1914, the same being the 85th judicial day of the regular March term of said court; present: the Honorable Robert S. Bean, United

States District Judge presiding, the following proceedings were had in said cause, to-wit:

**ORDER DENYING MOTION FOR
NEW TRIAL**

(Title of Court and Cause.)

This cause was heard upon the motion of the defendant for a new trial herein and was argued by Mr. R. R. Giltner, of counsel for the plaintiff, and by Mr. Zera Snow and Mr. George B. Guthrie, of counsel for the defendant; on consideration whereof, it is ordered and adjudged that said motion be and the same is hereby denied; whereupon on motion of said defendant, it is ordered that defendant be, and it is hereby, allowed thirty days from this date within which to prepare and submit a bill of exceptions.

And afterwards, to-wit, on the 18th day of August, 1914, there was duly filed in said court, a Petition for Writ of Error, with a bond for the prosecution of said writ to effect in the sum of two thousand dollars (\$2,000.00), the bond being signed by Swayne & Hoyt, Inc., as principal, and Aetna Indemnity Company as the surety thereon. Writ of error duly issued and citation duly issued and served.

And afterwards, to-wit, on the 18th day of August, 1914, there was duly filed in said court, an Assignment of Errors in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS

(Title of Court and Cause.)

Comes now the defendant in this cause, and the plaintiff in error, upon the writ of error proposed to be sued out for the review by the United States Circuit Court of Appeals for the Ninth Circuit, of the judgment entered herein in favor of the plaintiff and against the defendant, and presents and files the following assignment of errors upon which the defendant will rely in the Appellate Court on the prosecution of the said writ:

I.

By the uncontradicted evidence in the cause *Swayne & Hoyt, Inc.*, was the managing agent only of the steamship "Camino," and the court erred in refusing to give the instructions to the jury requested by the defendant to return a verdict for the defendant.

II.

The court erred in refusing to give the following instruction to the jury requested by the defendant:

"It is charged in the plaintiff's complaint that the accident which brought about the alleged injuries to the plaintiff arose by the action of the foreman of the defendant, who it is said carelessly and negligently, and in his haste to unload the ship, gave the signal to the engineer to go ahead before this foreman was notified by the plaintiff or his co-workmen, who were handling

the load on the truck, to do so, and that the engineer operating the winch on the vessel, without notice to the plaintiff, obeyed this signal of the foreman, in consequence of which plaintiff was injured. I charge the jury that the foreman in question and the engineer operating the winch on the vessel were fellow servants of the plaintiff, and for any negligence of the foreman in prematurely giving, if he did prematurely give, the signal to the winch man, the plaintiff cannot recover in this action.”

III.

The court erred in refusing to give the following instruction to the jury requested by the defendant:

“The complaint charges among other things that by means of the manner in which the work of the unloading of the steamer ‘Camino’ was conducted, and the sudden and unexpected raising of the beam which the plaintiff with other workmen was engaged in landing from the vessel, that plaintiff was struck on the knee and was permanently injured and bruised in the knee joint, and in the tendons and ligaments thereof and the bone of the knee. I charge the jury that the burden of proof is upon the plaintiff to establish by preponderance of the evidence the permanent injuries claimed, and unless the jury can say by a fair preponderance of all of the evidence in the case that there is a permanent injury then the jury should conclude that the plaintiff was not permanently injured, and if you find for the

plaintiff no damages should be returned for any permanent injury.”

IV.

The court erred in applying as the law of the case the Employers' Liability Law of Oregon, and in charging to the jury in the course of the charge to the jury that the state's statutes of the State of Oregon required that all machinery other than that operated by hand power should, whenever necessary for the safety of persons employed in or about the same, or for the safety of the general public, be provided with a system of communication by means of signals so that at all times there may be prompt and efficient communication between employees or other persons and the operator of the motive power, and that a failure to so provide would be negligence within the state's statutes of the State of Oregon, and would entitle the plaintiff to recover, and that if through negligence in giving a signal at the time when the signal should not have been given, and on this account the injury occurred, then that the defendant, if it was operating the vessel on its own account and not as a managing agent, would be responsible under the Oregon statutes, because the Oregon statutes made the foreman or person giving such signal a representative of the master.

V.

The verdict and judgment are contrary to the evidence and to the instructions given by the court to the jury in that it sufficiently appeared at

the trial, and so the uncontradicted evidence was, that the defendant, Swayne & Hoyt, Inc., was the managing agent only of the steamship "Camino"; that the said vessel at the time of the accident was owned and operated by the Western Steam Navigation Company, all of the employees upon which, including the defendant, were employees of the owner of the vessel, and the defendant, Swayne & Hoyt, Inc., under the evidence, was not liable for the accident to the plaintiff, and the court erred in overruling a motion for new trial made by the defendant.

Snow & McCamant, and
Geo. B. Guthrie,
Attorneys for Defendant,
Plaintiff in Error.

Duly filed.

And afterwards, to-wit, on the 25th day of August, 1914, there was duly filed in said court, as of the date of the judgment by order of the Judge sitting at the trial, a Bill of Exceptions, in words and figures as follows, to-wit:

BILL OF EXCEPTIONS

(Title of Court and Cause.)

Be it remembered, that this cause came on for trial before the court and jury, a jury having been regularly impaneled to try the case, where-upon the following proceedings were had and taken in the course of the trial, the details and evidence stated below being incorporated in this

bill of exceptions by the direction of the trial judge presiding in lieu of the substance of the evidence which had been tendered.

C. D. Kennedy, a witness for the plaintiff, having been called and sworn, testified substantially as follows in answer to the questions put to him in behalf of the plaintiff and the defendant:

DIRECT EXAMINATION.

Q. Are you acquainted with Gustav Barsch, the plaintiff in this case, who is sitting over there?

A. Yes, sir.

Q. Are you acquainted with Swayne & Hoyt, Inc., a corporation, defendant in this case?

A. Yes sir, through some of the members of the firm. [1]

Q. State in what capacity you were acting for them on or about the 31st day of March, 1913, and prior thereto?

A. Local agent, Portland.

Q. State whether or not you were appointed agent and where you were appointed?

A. At San Francisco through a verbal agreement with Mr. Swayne and Mr. Moran.

Q. Mr. A. A. Moran?

A. Yes, sir.

Q. State when that was.

A. That was about the 1st of October, 1911—1912 I should say.

Q. How long did you act as agent for them?

A. Eleven months.

(Testimony of C. D. Kennedy.)

Q. For what purpose were you agent for them?

A. To act for them here in the capacity of agent in directing the movement of ships that were being run into this port under the Arrow Line.

Q. State what your duties were under that agency so far as to paying off the men and employing them and the manner in which it was done. [2]

A. Well, I as agent through my office—payment was made for all bills contracted for here by the ship that might be in port, its officers, its longshore bill, meat bills, and any bills that were contracted by the ship while in port.

Q. Did that include the bills for the payment of men who helped to load and unload the vessels?

A. Yes, sir.

Q. State whether you know of a ship called the steamship "Camino"?

A. Yes, sir.

Q. State whether or not they had any freight on that boat?

Mr. Snow: That is, you mean in March, 1913?

Q. Yes, March of that year, Mr. Kennedy.

A. Yes, freight was transported on that ship under their agency at San Francisco.

Mr. Snow: Under whose agency?

A. Swayne & Hoyt.

(Testimony of C. D. Kennedy.)

Q. State if on the 31st day of March, 1913, you understood that?

A. Yes, sir.

Q. State if you know whether Gustav Barsch was employed to work on that boat?

A. Yes, according to the payroll, and knowing that our office had him on our payroll, and paid him off.

Q. For whom did you have him on your payroll?

A. For the ship "Camino."

Q. And who else?

A. Well, Swayne & Hoyt, of course, and—Swayne & Hoyt, I accounted for the payments to them.

Q. State whether or not you transmitted to Swayne & Hoyt any money that you paid out for, and on account of the employment of Barsch and the other men who assisted in loading the steamship "Camino" on or about the 31st day of March, 1913—whether you transmitted the bill to them?

A. I accounted to them for the money paid out to those men, men that [3] were employed in working the ship.

Q. State whether or not Swayne & Hoyt repaid you?

A. Well, I made collections, and made payments for their account, and remitted or collected from the difference that might exist.

Q. How often had you done that?

A. Well, periodically. Probably once a week

(Testimony of C. D. Kennedy.)

or every ten days during the eleven months I was employed.

Q. Now, you say you made collections. Isn't it a fact they transmitted to you payment for the money you paid out for them?

A. What is that?

Q. Isn't it a fact you paid off the men who were unloading the steamship "Camino," and transmitted that to Swayne & Hoyt, and they repaid you for the money you paid out?

A. Transmitted? I can't transmit the money.

Q. I know, but you sent the account?

A. Certainly.

Q. And they repaid you?

A. In the regular accounting, I was reimbursed by them for any payments. It was their money I was paying out.

Q. Now, just tell the court and the jury the manner in which these men would be employed who would work in unloading this vessel?

A. The manner of being employed?

Q. Yes, to unload the boat—how it was done?

A. Well, I have a man in our—on Alber's wharf, Mr. Dosch, and he engages the men from longshoremen's hall for most all ships. I wouldn't say for this particular ship; probably he did. It was his custom to learn from the mate or officer of the ship, how many men he required for the ship, and Mr. Dosch knew how many men he required for the dock end of the work, and summing the two numbers of men together, he

(Testimony of C. D. Kennedy.)

called to the hall for a certain number of men that were wanted for working the ship, which was sent down, and so many men were turned over to the ship, and so many men kept on the wharf, and after the ship [4] sailed, the account of the longshore wages was made up, and sent to our office, and the men called at our office for their money, and signed their names for it.

Q. State if you remember of Gustav Barsch being injured about the 31st day of March?

A. Through his report to me.

Q. You say you remember the accident?

A. Through his report to me. Mr. Barsch reported to me that he had been injured, yes, sir.

Q. I wish you would state whether or not Mr. Barsch applied for a letter from you to Swayne & Hoyt—to give him a letter to Swayne & Hoyt?

A. Yes, sir.

Q. Did you give him a letter?

A. Yes.

Q. State if you remember whether you took him to a doctor after he returned from California, to be examined?

A. I did.

Q. At whose instance?

A. Swayne & Hoyt; that is, when I say Swayne & Hoyt, of course if I got instructions from Mr. Moran to do anything, I considered this in connection with Swayne & Hoyt.

Q. Who is Mr. Moran?

A. Well, he has charge of the shipping de-

(Testimony of C. D. Kennedy.)

partment for them, I understand. He gave me my instructions to a certain extent in connection with the movement of the ships coming up here.

Q. That is Mr. A. A. Moran?

A. Yes, sir.

Q. State then after this man was examined, whether he ever called on you again?

A. I don't remember. [5]

CROSS-EXAMINATION.

Questions by Mr. Guthrie:

Mr. Kennedy, when you got a letter from Mr. Moran, you believed that to be the same as Swayne & Hoyt, you say?

A. Yes, sir.

Q. You are aware of the fact that Mr. Moran is also an officer and in charge of the shipping department of the Western Steam Navigation Company, aren't you?

A. I understand so. I haven't definitely known of the position he held with them.

Q. And Mr. Swayne is also an officer of the Western Steam Navigation Company?

A. Well, he is a member of Swayne & Hoyt.

Q. He is a member of Swayne & Hoyt, but I say he is also an officer of the Western Steam Navigation Company?

A. That is not known to me personally.

Mr. Giltner: I don't think that is proper cross-examination.

Mr. Guthrie: I think it is very material.

(Testimony of C. D. Kennedy.)

Court: Proceed with the examination.

Q. So if you got letters from Mr. Moran, directing the examination of this witness, he may have been representing the Western Steam Navigation Company as much as Swayne & Hoyt? Isn't that true?

A. Yes. I don't know who he represented.

Q. And if the plaintiff called at the office of Swayne & Hoyt, he would also be in the office of the Western Steam Navigation Company, would he not? You have been in those San Francisco offices, you say?

A. I have been in San Francisco, yes. I don't know—if they are agents for the Western Steam Navigation Company, their offices would be together also.

Q. They are officers; if I understand your testimony, of the Western Steam Navigation Company?

A. No, I don't know that.

Q. You say you kept these accounts and forwarded an account of these [6] voyages of these vesels to San Francisco, did you not?

A. Yes, sir.

Q. Tell us in some detail how these accounts are kept, Mr. Kennedy. That is, do you keep a Swayne & Hoyt account, and do you charge Swayne & Hoyt with disbursements at your dock, as Swayne & Hoyt, or do you charge a certain voyage or a certain vessel?

A. We did keep an account with Swayne &

(Testimony of C. D. Kennedy.)

Hoyt, and reported the accounting for each vessel separately.

Q. This particular voyage, which is the particular one on which this injury to Mr. Barsch is alleged to have occurred, is Voyage No. 12, according to the complaint, I believe. At least it appears somewhere in the papers.

Mr. Giltner: It doesn't appear in the complaint.

Mr. Snow: What is the fact now, Mr. Kennedy?

Q. Was that Voyage No. 12?

A. I can't say as to the voyage.

Q. If I were to refresh your recollection with some of your letters, could you tell?

A. Yes, sir.

Q. I show you a letter, merely for the purpose of refreshing your recollection, and ask you what voyage it was?

A. Yes, I reported this personally in connection with Camino, Voyage No. 12.

Mr. Giltner: To Swayne & Hoyt?

A. To Swayne & Hoyt.

Q. So that your record, as far as disbursements and receipts is concerned, was made up for Voyage No. 12 of the Camino, was it not?

A. Yes, sir.

Q. And receipts—you collected the ship's money for freight, did you not?

A. Yes, sir.

(Testimony of C. D. Kennedy.)

Q. And you also made the disbursements spoken of, did you not?

A. Yes, sir. [7]

Q. And you also collected such advance freights as might be prepaid?

A. Yes, sir.

Q. And the balance, if any, going either was you remitted, or if balance due you, you drew on them for that balance?

A. They remitted, or if we had enough moneys on account of other ships, it wasn't necessary to draw. If it was necessary to draw, we drew.

Q. Now, what relation, do you know, from your conversations you have had with the members of the Swayne & Hoyt Company at the time you were appointed agent that you spoke of—what relation did Swayne & Hoyt have in connection with these boats? What do they call themselves?

A. General agents for the Arrow Line.

Q. General agents for the Arrow Line?

A. Yes, sir.

Q. Now, in handling these matters, they were not the officers or owners—you knew that, did you not?

A. I didn't know that. I don't presume they were the owners. Might have been part owners.

Q. You considered them as managing agents?

A. Yes, sir.

(Testimony of C. D. Kennedy.)

Q. And as managing agents, you represented them locally in Portland?

A. Yes, sir.

Q. And all these payrolls, you spoke of, had been signed by the men working on longshoring, as well as others that were made out, they were made out on account of the steamer and the particular voyage, were they not?

A. Yes, sir.

Q. And it is equally true, is it not, Mr. Kennedy, that these payrolls made out, show you had paid out, and the men had received on account of the steamer Camino's owners, and not on account of the managing agent. Isn't that true? I will show you one.

A. We had a regular form to use.

Q. Let me show you one, and ask you if this document I show you is one [8] of the forms you refer to?

A. Yes, sir. That is the form we used for paying longshoremen and taking their receipts.

Q. Now, at the top of this statement it says, "Steamer Camino, Voyage No. 12." Can you identify this as one of the duplicate statements, Mr. Kennedy, made out in your office, under your general supervision, so you can identify it as being that particular voyage?

By Mr. Giltner: Is that a duplicate or an original?

A. This is our office copy of a payroll, the original of which was undoubtedly sent to

(Testimony of C. D. Kennedy.)

Swayne & Hoyt at San Francisco, and this has been made out by Mr. Williams, clerk of the ship, and approved by Captain Ahlin, master of the ship.

(After some colloquy between the counsel and the court, the payroll was received in evidence and marked Defendant's Exhibit "A".)

Q. In this connection I would like to read portions; I don't care to read it all. The first part is repeated on each sheet, "Office of Swayne & Hoyt, San Francisco, California." That is stamped in the corner, "Received from Captain _____ for account of above steamer and her owners," and at the top it says, "Steamer Camino, Voyage No. 12."

Q. By Mr. Giltner: There is one question may I ask before he goes by, so as to give them a chance to cross-examine. Did Swayne & Hoyt have any cargo or freight on that boat, the steamer Camino, on the 31st day [9] of March, 1913?

A. There was cargo aboard that ship under their directions, that they had secured at San Francisco, and sent up here that the ship was handling. The ship was handling cargo that didn't belong to them, of course.

Mr. Giltner: They had the handling of it?

A. It was received under their direction, and delivered under their directions through me here.

Mr. Giltner: And they were having the handling of that cargo—isn't that a fact?

(Testimony of C. D. Kennedy.)

A. I don't know—

Mr. Giltner: Through you?

A. I was directing the handling of it, yes.

Mr. Giltner: Who by?

Mr. Snow: This is our examination, Mr. Giltner.

Court: Don't interrupt until they get through.

Mr. Giltner: All right, but you can answer that. Who by?

A. What was the question?

Mr. Giltner: Who were you directed to handle it by?

A. It was understood through the arrangement that I entered into with Swayne & Hoyt, taking the agency there.

Q. (Mr. Guthrie.) And you understood that Swayne & Hoyt were general agents for the owners, handling cargoes?

A. Yes, sir.

Q. And you were really sub-agents, through the agents of the owners, acting through the managing agents. Isn't that true?

A. I presume so, yes.

Q. Now, in connection with these matters, Mr. Kennedy, do you mean the jury to understand from your testimony that you, as local representatives of the managing owners, would have had the right to go down there and direct the captain how to handle his tackle?

A. No. [10]

(Testimony of C. D. Kennedy.)

Q. That is, you were not in active control of the ship's tackle, were you?

A. No, sir.

Q. And Swayne & Hoyt were not through you in that control?

A. No.

Q. So you had no control of handling the cargo as the ship handled it over the ship's rail?

A. No.

Q. That was done wholly, then, by the ship and her officers?

A. Yes, sir.

Q. And they were under the control of the master, were they not?

A. Yes, sir.

Q. And he represented the owners?

A. Yes, naturally.

Q. Now, who operated the winches, do you remember? Men from the ship or men from the union?

A. I don't know. It was customary for the men from the ship to operate them.

Q. And the Camino was usually operated by her own winches, is that true?

A. Yes, yes.

Q. Now, something was said about Mr. Dosch getting information from the captain as to how many men he needed?

A. I think I said mate.

Q. Why did Mr. Dosch go to the captain if Swayne & Hoyt were in control, as suggested?

(Testimony of C. D. Kennedy.)

A. I think I said mate. He has orders from the mate. The men on the dock wouldn't naturally know what was required on the ship.

Q. And it would not have been in your province as local agent of Swayne & Hoyt to have directed the number of men to go on the ship?

A. No.

Q. And you were not, as agents or sub-agents, in direct charge of the men who were aboard the vessel? [11]

A. No.

Q. Now, Mr. Barsch came to you with respect to this injury, did he not?

A. Yes, sir.

Q. And you say you gave him a letter to Swayne & Hoyt?

A. Yes, sir.

Q. What were the circumstances at the time of his going to them? Do you recall?

A. He told me that he was going to San Francisco and that he would like to have me give him a letter or something, to Swayne & Hoyt at San Francisco, so he could call on them, and see what he could do towards obtaining some settlement or redress for his injuries.

Q. Did you understand that he was going on down to Los Angeles, to a longshoremen's convention at that time?

A. I think I understood that from other sources, not from him; understood there was to

(Testimony of C. D. Kennedy.)

be a convention at San Diego, and he was to be a delegate, I believe.

Q. He was not, then, making the trip specially to look into his injury?

A. I didn't understand so.

Q. Was anything said to you after *you* (he) came back about the extent of his injuries, or what compensation he desired?

A. No, I don't think so.

Q. Do you remember how much he considered his doctor bills amounted to?

A. I don't remember his telling me.

Q. I will see if I can show you a letter, and it may refresh your recollection. I show you this letter, dated April 21, 1913, and ask you to look at the second page of that letter, and see if it will refresh your recollection as to what was said to you by Mr. Barsch at that time.

Mr. Giltner: If the court please, no claim is made in the complaint here for doctor bills, but I may make the complaint after awhile. It was inadvertently left out, and we will show what they were.

Mr. Snow: Go ahead, Mr. Kennedy. [12]

A. This was a report I made in the matter to Swayne & Hoyt, before he went to California, not after.

Q. Not afterwards. Then at the time you made this report, which was April 21, 1913, according to its date, what had been the amount of

(Testimony of C. D. Kennedy.)

doctor bills incurred at that time by Mr. Barsch, according to his statements to you?

A. Is the amount mentioned in there? I didn't notice that. He told me whatever I reported in the matter.

Q. You will find it right in the middle. That is what I handed it to you for.

A. The doctor bills were five or six dollars.

Q. Then April 21, 1913, or a little more than three weeks after the accident, the report was made to you that his doctor bills at that date amounted to five or six dollars?

A. Yes, sir.

Mr. Snow: That is Barsch's report to you?

A. Yes, sir.

REDIRECT EXAMINATION.

Q. Why did you make that report to Swayne & Hoyt for the doctor bills?

A. In mentioning—it is my duty, as agent, to report any accidents that might be occurring in port, and I reported the matter to Swayne & Hoyt, San Francisco.

Q. Why didn't you report it to the American Transportation Company that they speak of—the Western Steam Navigation Company?

A. I didn't know them.

Q. You never knew them in the transaction?

A. No.

Q. Did you ever at any time tell Gustav

(Testimony of C. D. Kennedy.)

Barsch that he was working for the Western Transportation Company?

A. No.

Q. Western Steam Navigation Company?

A. No. [13]

Q. Isn't it a fact that there was written and painted—I mean painted over the bow of this steamship Camino, "Swayne & Hoyt, Inc., San Francisco, Arrow Line, Portland, Managers"?

A. I don't think it had Portland on it.

Q. Didn't it have "Managers" on the bow of this boat?

A. I think so.

Q. Is it not a fact that Swayne & Hoyt were interested in the handling of that cargo?

A. Why, they were interested to the extent of their being agents.

Q. And to that extent you were representing them, were you not?

A. Yes, sir.

Q. You made a statement here, did you not, that Swayne & Hoyt were also interested in this steamship Camino?

A. Well, I don't know that I said they were interested except as agents. That is all I know them in the matter, as agents.

Q. Did you ever talk with Mr. Snow or Mr. McCamant about this transaction?

A. Yes.

Q. How often?

A. Once.

(Testimony of C. D. Kennedy.)

Q. What?

A. The two gentlemen together, once.

Q. Is it not a fact that on and prior to March 31, 1913, the defendants, Swayne & Hoyt, were the managing agents of the steamship Camino, with power to direct the movements and operations of the officers and crew of said ship, and said ship?

A. They were managing agents, and they directed the movements of the ship, I will say, yes, sir.

Q. And the operation of the officers and crew of such ship?

A. As far as I know, they employed the officers of the ship. The officers usually employ the crew.

Q. With power of directing the movements and operations of the ship, [14] and the officers and crew?

A. The movements of ships are generally directed by the officers of the ships.

Q. I mean Swayne & Hoyt were over them. Isn't that a fact?

A. Yes, I would think so.

Q. Did you ever have at any time, any admission from Swayne & Hoyt as to their liability in this case; any letters or anything that were written to you?

A. No, I don't think so. I had correspondence with them in connection with the reporting of the matter, but I had difficulty in getting replies to

(Testimony of C. D. Kennedy.)

my report which were solicited on account of Mr. Barsch calling on me.

Q. Did you send them any telegrams in regard to it?

A. I think I did towards the last, after Mr. Barsch returned from San Francisco.

Q. Did you get any in return from them, or anything of that kind?

A. I think there is one telegram passing each way between us, if I remember right.

Q. Have you got that telegram?

A. No.

Q. Who has it?

A. Well, it may be in the files that the attorneys have.

Mr. Giltner (to Mr. Snow): Have you got that?

Q. What did you do with the telegram?

A. If it is not there, it must be in my office in the file there.

Q. Did you turn the files over to Snow & McCamant?

A. One file turned over to them, yes, sir.

Mr. Giltner (to Mr. Snow): Have you got that telegram?

Mr. Snow: No, no telegram from them at all.

Mr. Guthrie: We have copies of some telegrams he sent down.

Mr. Giltner: May I see the copies he sent down?

Mr. Snow: Give us notice to produce. [15]

(Testimony of C. D. Kennedy.)

Mr. Giltner: I give you notice now.

Mr. Snow: Go on and make your proof, give us notice.

Mr. Giltner: May I look at those?

Mr. Snow: No, you can't look at this file at all.

RE-CROSS EXAMINATION.

Questions by Mr. Guthrie:

Something was said now, Mr. Kennedy, by Mr. Giltner on his redirect examination, with respect to what Swayne & Hoyt thought of this man's injuries?

A. Yes.

Q. I will show you here a letter of May 14, 1914, signed by Moran—evidently a mistake as to the year—enclosing another letter sent you, which had something to say respecting the liability in this accident. I want you to look at this, and see if this is what Mr. Giltner is examining you about?

A. Yes, this escaped my memory. This matter is so. I couldn't remember this letter.

Q. And refreshing your recollection, now, Mr. Kennedy, was this admission which Mr. Giltner referred to, one that Swayne & Hoyt were liable, or that the steamship was liable?

Mr. Giltner: I object to that. I never asked him in regard to this admission. I asked him if any letters were written wherein they admitted that. I never asked for this letter. I asked to look at any letters they had.

(Testimony of C. D. Kennedy.)

Mr. Guthrie: He says now he does remember, and this is the matter.

Court: It wouldn't be competent unless it is admission of liability. They deny liability.

Mr. Guthrie: This is not our witness. This is merely to go into this full matter. Your Honor has ruled it is not admissible.

Q. Now, from some of the questions just asked you a few minutes ago, Mr. Kennedy, respecting the appointment of officers and master and crew, you don't want this jury to understand you know whether or not Swayne & [16] Hoyt appointed these men?

A. No, sir.

Q. You don't know anything about that, do you?

A. No, sir.

Mr. Giltner: What was the answer you made?

A. I don't know for certain that Swayne & Hoyt employed the master of the Camino or any other of their ships.

Q. And you don't know anything about the appointment of a master?

A. No, sir.

Q. Don't know who employed them or for what purpose?

A. No, sir.

Q. Now, along that same line Mr. Giltner's complaint or Mr. Barsch's complaint in this matter, has three general specifications of negligence. I want to know whether or not you or any one

(Testimony of C. D. Kennedy.)

here representing Swayne & Hoyt could have remedied these conditions. Could you have gone down there, and given instructions regarding a system of signals?

A. No, sir.

Mr. Giltner: I object to that as immaterial, incompetent and irrelevant.

Court: Go ahead.

Q. Could you have interfered, or could you have required a different set of signals to have been inaugurated?

Mr. Giltner: I object to that as incompetent, irrelevant, and immaterial, and not proper cross-examination.

Court: You are trying to show by this man your plaintiff was employed by Swayne & Hoyt.

Q. There is also an allegation of negligence in neglecting and failing to furnish a hatch tender or signal man. Could you or any man here representing Swayne & Hoyt, determine whether they should put a signal man on there, or must that come from other sources?

A. I couldn't.

Q. It was no part of your duty to determine whether to put a hatch [17] tender or signal man there?

A. No, sir.

Q. That is also wholly up to the officers of the ship?

A. Yes, sir.

Q. There is also a third specification saying

(Testimony of C. D. Kennedy.)

some one gave a signal to go ahead before he was notified by the men handling the load on the truck to do so. Do you know of your own knowledge whether there was a foreman of the dock down there at the time Barsch was hurt—I doubt whether you do. I just wondered whether you knew of your own knowledge there was a foreman at that time?

A. Foreman in charge of the men?

Q. At the time Barsch was hurt, the very time, half past seven or eight o'clock.

A. I can't say.

REDIRECT EXAMINATION.

Q. Now, Mr. Dosch was under you, was he not?

A. Yes, sir.

Q. Representing you when you were representing Swayne & Hoyt, in looking after the men for unloading that ship?

A. Yes, sir.

Q. Isn't that a fact?

A. Yes, sir.

The payroll referred to was offered and received in evidence as the payroll, containing the following at the head of the payroll:

“Office of Swayne & Hoyt, San Francisco, California.

Received from Captain —— for account of above steamer and her owners.” [18]

Then followed signatures of men engaged in

(Testimony of C. D. Kennedy.)

the unloading and the name of the plaintiff Barsch was signed to the payroll, each of the names signed on the payroll indicating that each had received a given amount for work while unloading the vessel. On the payroll were stamped the words "Steamer Camino, Voyage No. 12."

E. A. Schneider, a witness in behalf of the plaintiff, having been called and sworn, testified substantially as follows:

Q. Mr. Schneider, what is your business? [19]

A. Longshoreman.

Q. Do you belong to the Longshoremen's Union?

A. Yes, sir.

Q. What position did you occupy in the Longshoremen's Union on and prior to the 31st day of March, 1913?

A. Business agent and secretary.

Q. Business agent and secretary?

A. Yes, sir.

Q. What were your duties in relation to that, in regard to making contracts for the men in the Union, to work in unloading and loading the ships that would come into port?

A. My duty was to fill the orders.

Q. What is that?

A. My duty was to fill the orders for men, you know, on telephone calls, or furnish gangs, you know, the men on these ships.

(Testimony of E. A. Schneider.)

Q. You had the power to make contracts for the men?

A. Yes, sir; the ships.

Q. Now, then, I wish you would state if you know one Gustav Barsch?

A. Yes, sir.

Q. Are you acquainted with Swayne & Hoyt, the defendants in this case?

A. Well, I know the company.

Q. State if you are acquainted with the steamship Camino?

A. Yes, sir.

Q. State if you had anything to do with the hiring of the men for the unloading of the steamship Camino?

A. Yes, sir. I had.

Q. On the 31st day of March, 1913, and with whom, and tell what took place.

A. Well, Mr. Dosch phoned for the men—

Q. What is that?

A. Mr. Dosch.

Q. What was the conversation that took place between you? [20]

A. He wanted so many men for the dock, and so many men for the ship. You see the ship carries a crew of eight, you know, and they always want a few extra longshoremen, you know, to work in the hold with the sailors, to make up two gangs.

Q. Did Mr. Dosch say for whom these men were, or anything? What was the conversation?

(Testimony of E. A. Schneider.)

A. The conversation was that he wanted so many men down there on the Swayne & Hoyt dock, the American-Hawaiian dock, or Swayne & Hoyt boat.

Q. Who for? What for?

A. The Swayne & Hoyt people.

Q. And for what purpose?

A. For discharging the vessel.

Q. For the Swayne & Hoyt people?

A. Yes, sir.

Q. Now, I wish you would state for the jury here, how the ship was rigged for unloading this cargo at that time.

A. Well, the ship was rigged just the same as all coasting vessels, you know.

Q. Well, these men don't know. I wish you would describe the cables.

A. Rigged, you know, with a double set of booms, you see, and fall, double fall, you know, double winches.

Court: You mean by "fall," rope or cable?

A. Yes, cable that leads up from the drum of the winch, through the lead block, up through the falls, you know, and the two falls comes together. You see there is the off-shore fall and the inshore fall, and the two falls come together, connected together with hook to hook on the cargo. That is to lift it from its position, wherever the load is made up in the hold, or wherever the load is made out in the dock so they can carry either way, carry offshore or carry inshore, to be taken

(Testimony of E. A. Schneider.)

apart, and the inshore as a general rule is what the sea-faring man calls the yard arm. The yard arm falls at a given signal; the yard arm fall and the offshore fall. [21]

Q. I wish you would state if they had any donkey engine there, or steam winch?

A. Yes, sir.

Q. How were they operated?

A. The winches were operated by one man with a lever in each hand, double winches.

Q. What kind of power did they use?

A. Steam power delivered from the engine room.

Q. Describe the sling that was used for hitching on to each end of the iron beam.

A. Well, they used the two chain slings; you see this beam, perhaps, is 18 or 20 feet long, something. They pick it up and they would grasp a hook on one end and hook the other, what they call a spread sling, and they hook on both ends of it and pick it up and deliver it on the dock.

Q. How was that sling attached to the cable or fall?

A. That was hooked on the cargo.

Q. I know, but how was it attached? How was it attached, this sling and the cargo attached to the fall?

A. How was it attached to the fall?

Q. Yes.

A. You mean the hook?

Q. Yes.

(Testimony of E. A. Schneider.)

A. That was hooked by chains and shackles, what we call shackles.

Q. And the rigging was attached to the end of a fall?

A. Yes, sir.

Q. And the sling was attached to the end of the rigging? Then they would raise it from the ship to the side?

A. Yes, sir.

Q. And the boom would carry it over the side of the ship to the dock?

A. The yard arm.

Q. And that would drop it down?

A. The yard arm bolt. [22]

Q. And that was the method they used on the steamship Camino at this time?

A. Yes, sir.

Q. Do you know whether there was anything painted on the bow of this boat, the steamship Camino?

A. Yes, sir, printings.

Q. Just tell the jury what was there?

A. They always—there is an oblong figure with their arrow through it, “Arrow Line, Swayne & Hoyt Company, Managers.”

Q. I will ask you to look at this and state whether—

A. Or Swayne & Hoyt Company—

Q. (Continuing.) Whether it represents it.

A. Yes, sir, that represents it. That is on the bow.

(Testimony of E. A. Schneider.)

Mr. Giltner: I offer this in evidence, if the court please.

Mr. Snow: I don't care anything about it. Marked "Plaintiff's Exhibit 2."

CROSS-EXAMINATION.

Questions by Mr. Guthrie:

Mr. Schneider, you said that a certain method obtained down there in unloading that boat?

A. What?

Q. A few moments ago, in response to Mr. Giltner's question, you said that they had a certain method down there of unloading that boat.

A. Yes, sir, we had.

Q. You were down at the dock at the time Mr. Barsch was hurt?

A. No, sir, I was not.

Q. So you don't know of your own knowledge what was doing at that time?

A. I do.

Q. How do you know?

A. I have worked on them boats.

Q. Were you down there at the time?

A. No.

Q. Then you don't know what was done there at the time. How do you [23] know if you weren't there?

A. From general experience.

Court: At the exact time?

Q. We don't care about general experience—about the exact time.

(Testimony of E. A. Schneider.)

A. I didn't work on this vessel.

Q. Did you work that night?

A. No, sir, I was working there that night.

Q. On the Camino?

A. No, sir.

Q. Then you don't know how Mr. Barsch was working, or what system obtained?

A. Well, I don't say that I do. I didn't work down there on the boat.

Q. That is what I want to know.

REDIRECT EXAMINATION

Q. Did you ever see the steamship Camino?

A. Yes, sir.

Q. Did you ever see them taking freight off her? And taking freight on, unloading and loading it?

A. Yes, sir, I did.

Q. Did you see the steamship Camino any time she was in port on the 31st day of March?

A. Yes, sir.

Q. Did you see them at any time taking freight off the vessel?

A. Yes, sir.

Q. Were they taking freight off the vessel, as you describe it?

A. They were taking freight off the vessel, delivered down on the dock.

Q. Could it have been done in any other way?

A. Albers No. 3 Dock, there is where they delivered the freight.

(Testimony of E. A. Schneider.)

Q. Could it have been done in any other way, the structural iron beams?

A. The beams was delivered right by the ship.

Q. I know, but could they have used any other machinery?

A. They could, yes. [24]

Q. And was the winches that they had on the ship used for the purpose? Isn't it a fact that they were used for the purpose of taking—

A. Yes, sir.

Q. These heavy beams and heavy loads off the ship in that manner?

Mr. Guthrie: That is leading.

A. Yes, sir.

Mr. Giltner: I will follow it up and show it.

RE-CROSS EXAMINATION.

Q. You are a very good friend of Mr. Barsch, too, aren't you?

A. Just in a brotherly way, that is all.

Q. You take a good deal of interest in this case?

A. No, sir.

Q. Testify here frequently?

A. No, sir.

Q. Never testified here before?

A. Oh, I have a few times.

Q. Quite frequently, don't you?

REDIRECT EXAMINATION.

Q. But you testify only when you see the ac-

(Testimony of E. A. Schneider.)

cident, or you are a party to the contract of employment; isn't that a fact?

A. Yes, sir.

Q. And what you have stated is the truth in this case?

A. Yes, sir.

RE-CROSS EXAMINATION.

Q. Ever talk with Mr. Giltner about this case before?

A. No, sir, didn't know anything about it until I was subpoenaed on the case. Mr. Barsch has never spoken to me about it.

Q. You have talked to Mr. Barsch about it them?

A. No, sir. Mr. Barsch has never spoke to me about the case.

Q. Ever talk to Mr. Giltner's associates, Mr. Sewall or Mr. Brazell?

A. No, sir.

Q. Never talked since that day until now?

[25]

A. No, sir.

Witness excused.

E. A. Schneider, recalled.

DIRECT EXAMINATION.

Questions by Mr. Snow:

Mr. Schneider, is this your signature to the payroll?

A. Yes, that is my signature. I signed "H. O. Wolff, by E. A. S."

(Testimony of E. A. Schneider.)

Mr. Giltner: Is that E. A. S. there?

A. Yes.

Mr. Snow: That is already in evidence.

Mr. Giltner: I should like to cross-examine Mr. Schneider on that.

Questions by Mr. Giltner:

Did you read this over?

A. Yes, sir. No, I didn't.

Q. When you signed his name?

A. Just what they showed me, now.

Q. You just signed his name without reading it over, this paper?

A. I just signed his name without reading it over.

Q. Could you tell now what this writing is on the top without reading it?

A. I could if I looked at it.

Q. Without looking at it?

A. Swayne & Hoyt, Steamship Company.

Q. Yes. Could you tell what receipt you were signing?

A. Yes, sir, I signed Mr. Wolff's payroll.

Q. But who did you sign the receipt for? For Mr. Kennedy or for—

A. Mr. Kennedy.

Q. And that is what you believed when you were signing this?

A. Yes, for the Swayne & Hoyt people.

Q. Did the captain of the vessel or anybody else pay you any money?

A. No, sir.

(Testimony of E. A. Schneider.)

Q. No, sir. [26]

A. No, sir, I would like to state to the jury, if it is permissible at this time to make a statement to the jury, that Capt. Ahlin was mentioned, and Capt. Ahlin asked me to go down to the vessel; that is, previous to this time, so we know who we were working for, and Capt. Ahlin told me that Swayne & Hoyt people were dissatisfied with the conditions in the Port of Portland there.

Mr. Snow: I think this is wholly objectionable.

Court: No, it is not competent.

Mr. Snow: I move to strike it out.

Mr. Giltner: No objection to that.

CROSS-EXAMINATION.

Questions by Mr. Guthrie:

You have signed this thing a great many different places, for different men?

A. Yes, sir; the boys tell me they are liable to be busy, going on the dock the next day, and they tell me "Ed, go and get my money."

Q. This "E. A. S." is everywhere your name?

A. Yes, sir.

Q. So you are very familiar with the payroll?

A. Yes, sir; I put my signature for every man's name I sign, so the office force or cashier knows.

Q. And you have no difficulty reading plain English language either?

A. No, sir.

(Testimony of E. A. Schneider.)

Q. And when these men were sent down to the steamer by you, didn't you send a list of these men down for the time keeper to make the roll by?

A. Yes, I sent a list of the men down there, yes, sir.

Q. And at the top of each list, you list them under the steamer, don't you? The steamer, not the dock, don't you? Isn't that the custom?

A. That would have no bearing—

Q. I asked if it isn't true. I don't care whether you think—

A. Naturally. The custom of the port. You see, a man working in the [27] office, and he gets a call for men; he sends them to the steamer direct, and directs the man what dock the steamer is located.

Q. Yes, that is all I want to know. What I wanted to know was what the fact was.

A. The steamer calls for the men.

REDIRECT EXAMINATION.

Q. Did you communicate to Mr. Wolff, or any one, as to what receipts you signed at this particular time?

A. No, sir, I didn't communicate. They asked me to draw their pay for them, and I drew their pay for them.

Q. And you gave them pay?

A. Yes, sir.

Q. Where was it you got the money?

(Testimony of E. A. Schneider.)

A. I got that on the second floor in the American-Hawaiian, Mr. Kennedy's office, before they transferred it down on Stark Street, on Third and Stark Street.

Q. Where did you get it from?

A. I got it from their cashier.

Q. Who was it?

A. I don't know the young man's name.

Q. Was he in Mr. Kennedy's office?

A. Yes, sir.

Q. What I want to know is, it was in Mr. Kennedy's office where you got the money?

A. Well, American-Hawaiian office, but under Swayne & Hoyt people, the Arrow Line.

Mr. Guthrie: You sign a great many—you have signed a great many of these before that particular time, haven't you?

A. I signed several of them, yes.

Witness excused. [28]

Henry Wolff, having been sworn as a witness for the plaintiff, testified substantially as follows:

DIRECT EXAMINATION BY MR. GILTNER.

Q. What is your name?

A. Henry Wolff.

Q. What is your business?

A. Longshoring.

Q. Do you belong to the same Union that Mr. Barsch belongs to?

A. Yes.

(Testimony of Henry Wolff.)

Q. You are acquainted with Mr. Barsch, are you?

A. Yes.

Q. State whether you were ever employed by Swayne & Hoyt, the defendant in this case.

A. Yes, sir.

Q. To assist in either loading or unloading any of their vessels prior to the 31st day of March, 1913?

A. Yes, a year ago, 1913, 31st of March.

Q. Well, were you ever employed to do any work for them before this accident happened?

A. Yes. Yes, sir.

Q. How often would you say?

A. Well, sometimes they run about every two weeks, they come in. Sometimes every four weeks, them boats. Some boats that come in every ten days. That is the way they come in.

Q. Who paid you?

A. The Swayne & Hoyt Company.

Q. Through whom were you paid?

A. Through Mr. Kennedy, through their agent.

Q. Now I wish you would state whether you were working with Gustav Barsch on or about the 31st day of March, 1913, about 7:30 P. M., the day on which he was hurt. [29]

A. Yes, we was working together; we was partners together, me and Gus.

Q. What were you doing?

A. In the morning Mr. Dosch, he phoned up

(Testimony of Henry Wolff.)

to our secretary of the Association to send so many men; I don't know how many; sometimes 28, sometimes 30, up to 40 men, the highest; and we come down to Alber's Dock No. 3, the dock where the steamer came in, was docked. We go down there, and Mr. Dosch, he placed the men. He send some on the ship and some on the dock, and some he tells to sort the freight, and he put two and two on it, half to land the loads on the dock, and pull them in, pull them in inside the dock, and these two or three men to sort that freight; they have to look out for all the marks.

Q. What?

A. They have to look out for all the marks, what is on the freight, the marks.

Q. Was any marks on this freight?

A. Yes, sir.

Q. Well, state.

A. Swayne & Hoyt & Company, and all kinds of marks. There is all kinds of freight carried there.

Q. Well, was the name Swayne & Hoyt on any of this freight?

A. There was some freight, yes, sir.

Q. Where was it taken from?

A. From the Camino.

Q. Well, now state what you had to do with that?

A. Well, I, of course—we had to land the loads on the dock and pull it in, inside the dock, and there was some men that took the freight off on

(Testimony of Henry Wolff.)

the dock from the truck and sorted it, and put it on the other docks, and some they took it away—see? We worked that day through the day, and at evening, five o'clock we went for supper; after we got back we worked a little, and the freight was all gone to the iron, to them building things; they were fourteen or sixteen inches wide, and sixteen or eighteen feet long. [30]

Q. How much would they weigh?

A. Seven or eight hundred pounds.

Q. Before you go further, I will ask you this question: How high was the top of the boat—the main deck of the boat above the dock, the floor of the dock?

A. Well, see in the morning, when we started in maybe she was a couple of feet above the dock, and in the evening about five o'clock, after five o'clock, she was seven or eight feet above the dock; she raised up. You know when three gangs take freight out the ship is going up; she is bound to go up; she raised out of the water.

Q. State how near they would drop the freight over the side of the vessel. How near to the vessel was the freight when they dropped it over?

A. With the small freight, what is slung, the boxes, and that stuff is about five feet from the vessel, just five feet and come right out to the edge, the front of the dock, alongside the steamer on the dock you see. The fall iron drops, about eight feet long; we land the load on and they unhook the hook and we pull the load in, inside the

(Testimony of Henry Wolff.)

dock, and we do that part of the day, in the evening, after half-past seven; and we start in on the iron, and you know there is a mast and there is two bolts on the mast; one is straight out that way; one that way, one that way (indicating); there is a fall on each boom, and it is connected on the winch; there is a big drum and it is operated with a winch—with steam, with them two falls; on each boom you see there is a fall and there is a shackle; them two wires or shackles come together in a ring, and in that ring there be two chains; there is the hook on the end, and then there was a chain; when we took the boxes, we didn't need these chains; all rope slings; all slung in rope sling, the boxes. Well, we was starting in on the iron; they took two big long chains; they hooked them two chains in that hook; hooked one hook on each end of the beam, and hooked it on like that (illustrating). They hoisted them up; this boom what is sent out to the dock that way, and they pull that out; pull [31] that out, over on the edge of the dock—on the ship; and the beams—the boom wasn't far enough out; we couldn't get any freight out on account the fall is striking the roof. They land one end down; we get ahold of it, me and him and pull it off on the ship, and she went right down against the ship—this end—this back end; the front end, we took that hook off, and we had to pull the load in a little to get that hook off on the other one. Can you understand that now?

(Testimony of Henry Wolff.)

Juror: Yes.

A. Why, we took out—I think we worked for half an hour on that beam; everything went all right; whenever we had it landed, we always hollered to the winchman “Go ahead,” when we had it unhooked; and that time, you know, half-past seven, it got dark; and as soon as we had that front one unhooked, I and my partner, he was stooped down and got hold of the handle—there is a handle on the truck, you know—he stooped down and got hold of the handle, and I was on the other side. We tried to pull the load a little in and unhook the hook, the front end, and as soon as we did the winch went ahead and raised the beam up and crushed that man here on the kneew, and cut a piece here out of the finger and knocked him down. That is the way she went.

Q. Where was the winch located?

A. Well, the winchman was in the center of the ship, on the center hatch.

Q. About how far away was he from you?

A. Well, about 28 feet.

Q. Was there anything to prevent you from seeing the winchman or the winchman seeing you?

A. He couldn't see us; we had to holler every time we unhooked the front hook, and we pulled the load a little in, and as soon as we unhooked the other hook, she was against the ship; we unhooked that and told the winchman to go ahead.

Q. State now if you were notified by any one

(Testimony of Henry Wolff.)

before the winchman went ahead with this load to get out of the way, or anything of that kind.

[32]

A. Well, we never notified him; we never notified; we always notify him when we had to hook.

Q. Did you get any notice from any one to get out of the way?

A. No.

Q. State by what power these winches were operated.

A. Steam.

Q. Steam power?

A. Steam power, yes. I think when I remember, they burn oil on that boat.

Q. What?

A. They burn oil on that boat. With steam. Through the day, you know, when the steamer it wasn't way up high, you see, where the winchman could see down and see what we were doing, and we don't need to holler at him at all; in the evening it got dark and the steamer raised up, and he couldn't see us, and every time we had unhooked, we hollered "Go ahead" and he went ahead. We never said a word to him, and we never had it unhooked yet; we was just about to pull a little away from the ship to get that hook loose.

Q. Did they have any signal man there?

A. No, they don't have nobody there.

Q. Never had any there?

(Testimony of Henry Wolff.)

A. No.

Q. Did they have any system at all of signaling you?

A. There was nobody over that hatch at all. The mate was walking once in awhile from one hatch to another.

Q. Who was the mate?

A. The officer from the ship.

Q. What are the duties of the signal man, if you know?

A. He is the hatch tender.

Q. What are his duties?

A. He is giving the winchman orders to go ahead and come back. He is put there, if they put him in there so he looks out so nobody gets hurt. [33]

Q. Is he in position to see the winchman?

A. He stays on the ship and he sees the winchman, and he gives the winchman the signal to go ahead and go back, and he has to look at the hold, and see if he is hooked on when the load comes up. And if the load isn't right, he has to tell the winchman to stop. He have to tell the winchman to stop that, the load ain't swung right, and he put the load on the dock. He have to give the winchman orders to go back.

Q. And he has to notify the men to get out of the way too?

A. Well, when they see—when he sees anything isn't safe, he tells the boys to look out, get out.

(Testimony of Henry Wolff.)

Q. What is the fact as to whether there is danger connected with unloading? Was any danger connected with the unloading of that vessel?

Mr. Guthrie: That is very leading.

Court: Let him describe the manner of the work, and the jury will understand.

Mr. Guthrie: I don't like words put in his mouth.

Q. I wish you would state how this load—how the loads were carried, or where they were carried from on the ship and how they were let over on the dock?

A. Lowered down.

Court: Now, you mean the iron?

Q. Yes, the iron.

A. The winchman, when it is taken out on the yard arm to the dock, and he is lowering it down, and we had to holler "lower" and "come back."

Q. What would you have to do when he would lower it down?

A. I had to get hold and put it so I could get it on the truck.

Q. Would Mr. Barsch have to do that too?

A. Yes, sir.

Q. Would the load be swinging in the air while he was taking hold of this load? Would the heavy beam, would it be up on the dock, or above the dock?

A. That was down then on the dock. [34]

Q. I mean the load, when swinging from the

(Testimony of Henry Wolff.)

boom, does the winchman leave it down on the dock, or do you have to get hold?

A. We have to get hold. We have to tell him they should have a signal man there to tell them to hold it, let the man get ahold of it. We have to get ahold of it, and steady it so we get it on the truck.

Q. And have to take right hold?

A. We have to get hold of the iron like that, the beam, one on each side and pull it in, and get it so we get it on the truck.

Q. That is before the load is on the truck?

A. Yes.

Q. Before it touches anything?

A. Before it touches anything, and we have to sing "come back." If they have a signal man on the ship, the signal man do that. He gives the winchman orders to lower a little, and when lowered a little, so we can land on the truck, he says "go back."

Q. That gives you an opportunity to get out of the way, does it?

A. Yes.

CROSS-EXAMINATION.

Questions by Mr. Snow:

Mr. Wolff, how long have you been a long-shoreman here?

A. Me?

Q. Yes.

A. 17 or 18 years.

(Testimony of Henry Wolff.)

Q. Working down on the dock all this while as a longshoreman, have you?

A. Working longshoreman, working on the dock and in the ships, and all; wherever I goes, I do work. When the foreman tell me to go in the hold; and he tells me to stay on the dock, we work on the dock.

Q. Now, you remember, do you, of helping unload the Camino in March of last year, 1913? You remember that, of course?

A. The Camino?

Q. Yes. [35]

A. Well, I was there, of course.

Q. And you remember the time when you and Mr. Barsch were together there, unloading, having your station on the dock, and when Mr. Barsch was hurt?

A. Yes, sir.

Q. Now, who employed you, or directed you to go up to the dock and do that work?

A. Who employed us?

Q. Yes. Who directed you to go up to that dock?

A. Schneider.

Q. What did Schneider say to you?

A. He told us to go down on the dock, on the steamship Camino. He hired us; he sent us down; so many men.

Q. The steamer Camino wanted so many men, and Schneider selected those men, and they

(Testimony of Henry Wolff.)

all went down to the Camino to unload her. Is that right?

Mr. Giltner: I object to that. He didn't say the steamer Camino wanted so many men.

Mr. Snow: One at a time. You had your innings, and we will take ours.

Q. Now, Mr. Wolff, Mr. Schneider selected the men to go down and unload the Camino?

A. Schneider?

Q. Yes.

A. Schneider comes down on this, he takes the work around there during the day and evening. When a boat works night and day, he comes around and sees how it looks, how the work goes on.

Q. But Schneider selected you men to go down and unload the Camino, did he?

A. Schneider got the order from the foreman on the dock; they phone up they want so many men.

Q. Wait a moment. Let's get our—

Mr. Giltner: Let him answer. [36]

A. Yes.

Mr. Snow: One at a time, and we will get through with this thing.

Q. Now, Schneider told you and Barsch and the other men to go down on this Alber's Dock?

A. Yes, sir.

Q. And help unload the Camino. How many men went down?

(Testimony of Henry Wolff.)

A. Well, I can't tell how many was that time. Sometimes we take more than another.

Q. No, not sometimes, but how many men this time, I mean. Do you know how many men were at work from the Longshoremen's Union down there unloading that vessel?

A. I couldn't say exactly how many there were. There were three gangs, I know.

Q. He told you to go down to the Camino dock, down to the dock where the Camino was tied up and unload the vessel? Is that right?

A. Who?

Q. Schneider.

A. He sent us down, he put us down on the list; yes, we went down.

Q. Now, you and Barsch and the other longshoremen, whatever their number may be, went down to unload the vessel. Is that right?

A. Yes, sir.

Q. Now, how long did it take you to unload the vessel? Do you know that?

A. We worked that day, and we worked that night, I think until 11 o'clock, and the next day I couldn't say how long we worked.

Q. How long had you been working before Mr. Barsch was hurt?

A. How long?

Q. Yes.

A. We worked all day that day, and we worked that night, and he got hurt half-past seven.

(Testimony of Henry Wolff.)

Q. And then you came back the next day and finished the unloading?

A. But Mr. Barsch never came back. He couldn't work.

Q. I am speaking about you. You came back the next day with the other [37] longshoremen and finished the unloading?

A. Well, I couldn't tell now whether we got through that night or not. That is a year ago. I don't remember if we finished that night. I know we worked until eleven o'clock. We may come back, I think. Yes, we worked the next day a little. I don't know how long she lasted the next day.

Q. When you began to unload the vessel, when you first went down, you say the vessel was about two feet above the level of the dock?

A. Above the dock.

Q. Above the level of the floor of the dock?

A. Above the dock. I call that above the dock, not level.

Q. All right, above the dock. The vessel was up two feet above the dock, and when night came along, by the time you got down to these irons to unload, she was some seven or eight feet above the floor of the dock?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. Just tell now what you and Barsch did

(Testimony of Henry Wolff.)

during that day that you were working, and just how you did your work.

A. We landed the loads on the dock, and unhooked the sling, and put the loads in inside the door, and there was some men that took the freight off and sorted the freight out, and put it on the piles, and piled it up, different piles.

Q. What did you and Barsch do about telling the winchman when to swing his stuff in? Just tell us that again.

A. What?

Q. What did you and Barsch do to the winchman—what did you say to the winchman?

A. We told him come back every time the load swung in, and when we got hold on it, and had it so we could swing it on the truck, we told him to go back.

Q. You told him to come back? [38]

A. We called him, yes.

Q. Now, just tell how Mr. Barsch was hurt at that time?

A. How much?

Q. How he was hurt.

A. Well, didn't I tell you before?

Q. Well, I would like to have you tell me again, if you will. You told Mr. Giltner.

A. We was taking out the iron in the evening. We landed a beam on the dock, and unhooked the front hook, and this other end was against the ship; that was against the side. That was tight against that. We couldn't unhook that.

(Testimony of Henry Wolff.)

We had to pull the load a little way, about two or three feet in, so we could unhook that there; hook on the other end; we had that front hook unhooked, and when we started to pull in, the winchman went ahead full steam, and raised the beam clear up, as high as the ship, and it knocked him down and took a chunk out of his finger.

Q. Now, then, after the injury to Mr. Barsch, you say he didn't go back the next day? Barsch didn't go back the next day?

A. The man couldn't walk.

Q. What?

A. The man couldn't walk, hardly.

Q. He didn't go back, did he?

A. No, no, he didn't go back.

Q. Now, you remember signing the payroll down there, don't you?

A. What?

Q. You remember signing that payroll, don't you?

A. I don't think I ever signed my name. I think Schneider drew my money. You see they always pay up after a day, you see, and I never lie around. If I get a job the next morning, I go to work, and I have the business agent draw the money.

Q. Then Schneider signed the payroll for you, did he?

A. Well, if I not sign, the man who draws my money have to sign.

(Testimony of Henry Wolff.)

Q. Well, you sent Schneider to draw your money? [39]

A. Well, a year ago; I couldn't remember all this.

Q. Well, here is the signature here to the payroll, that has been already received in evidence. "H. O. Wolff,"—is that your signature?

Mr. Giltner: Let me see it.

A. No, I didn't sign that. I guess Schneider drew that.

Q. Then you sent Schneider down to get your money, did you?

A. Yes, sir.

Q. You authorized Schneider to draw your money, did you, for that purpose?

A. Well, we don't need to lay off; when we get a job the next morning, we tell our business agent to go and draw the money, and he goes and draws the money.

Q. And you told Schneider in this instance to draw your money for this work?

A. Yes.

Q. Now, do you remember what Schneider said to you when he told you to go up and work on the Camino, when you first started up on the trip, the trip that Barsch was hurt?

A. Yes.

Q. What did he say to you?

A. He takes the name down, and he gets the list, and he says "Go ahead, and go down; go down on this ship."

(Testimony of Henry Wolff.)

Q. Did he mention the ship?

A. He mentioned the dock.

Q. Did he name the ship you were to unload?

A. Well, he mentioned the dock and the ship together.

Q. The ship Camino?

A. The dock and the ship.

Q. The ship Camino on the Alber's Company dock, is that right?

A. Alber's. [40]

E. Ferguson, having been sworn as a witness in behalf of the plaintiff, testified substantially as follows:

DIRECT EXAMINATION BY MR. GILTNER.

Q. Mr. Ferguson, what is your name?

A. E. Ferguson.

Q. What is your business?

A. Longshoreman.

Q. State if you are acquainted with Gustav Barsch.

A. Yes, sir.

Q. I wish you would state now what you were doing on or about the 31st day of March, 1913, about 7:30?

A. I was working on the steamer Camino.

Q. Were you working on the steamer or on the dock?

A. On the dock—slings on the dock.

Q. I wish you would state what you were doing.

(Testimony of E. Ferguson.)

A. I was taking the loads from Mr. Barsch and Mr. Wolff during the time that Mr. Barsch got hurt. They were landing the load on the truck and I was taking the truck away.

Q. Who was the dock foreman over you?

A. Mr. Dosch.

Q. And who was superintendent over all of you?

A. Well, the mate was there and Mr. Kennedy. They all have something to say over us.

Q. I will ask you whether the mate ever gave you any directions? What was his name, if you remember?

A. Oh, yes. I believe his name is Ahlin. When we are outside he give orders several times, hurry up, and told the winchman to go ahead.

Q. I wish you would state now if you saw this accident.

A. Yes, sir.

Q. Now state to the jury how this accident happened as near as you [41] can, and before you do that, I wish you would state as to the height of the ship over the floor of the dock, and where the winchman stood to run the steam winch.

A. Well, the ship was about eight feet, I should judge, over the dock, over the level of the dock, higher up than the floor of the dock. The winchman stood at the after end of No. 2 hatch in the middle of the hatch. He was probably—the hatch was about 24 or 28 feet long. I don't know.

(Testimony of E. Ferguson.)

It might have been 30 feet long. I never measured it, but the fall comes up in the middle of the hatch, or the cable, and then he would be—probably he was 25 or 30 feet from where we were, and we were inside the dock. I was inside the dock. He couldn't see me.

Q. Well, could he see Mr. Barsch and Mr. ——

A. No, he couldn't see them; impossible.

Q. He couldn't see them?

A. No.

Q. Why couldn't he see them?

A. Well, they weren't out in the light. There was no light in the edge, and the first place, him being so far aft, and they were right inside the door. He couldn't see inside the door. He couldn't see over the dock. He couldn't see the rail when it landed.

Q. Now, I wish you would state and explain how this accident happened, what they were doing.

A. Well, the rail came out, you know; they hoisted it up with the two falls, until it gets over the hatch, then they slack away on one fall, and take up another, and that takes it into the dock. It swung around there for awhile; they caught it, and steadied it.

Q. Swings around in the air, does it?

A. Yes, it swings around naturally, you know, when it comes up; it swings around. It won't go up steadily, you know. One fall slacks away, and the other fall hauls up, you know, and it nat-

(Testimony of E. Ferguson.)

usually swings around a little. They caught the thing, and they pulled it in. When they got it over the truck, they hollered to come back. He come back, [42] and they released the front hook. It was slung by two chains, you know, and a hook in each end; one hook was around this end of the beam, and the other this end, hooked right over.

Q. They released?

A. They were a T flange in the rail, the hook couldn't slip off, so they released the front hook, and then Barsch stepped down to catch hold to pull the truck in—

Q. Pull the truck or the load in?

A. Pull the truck or load—the load was landed in the truck then. He reached down to pull the truck in, and the mate happened to walk along the deck at that time, and he got right in the middle of the hatch, and he hollered to the winchman to go ahead, and the winchman went ahead full speed, and pulled that end of the rail up. The other end came down, and I looked around, and Barsch was laying on the floor of the dock, and his hands was all bleeding. I was watching the boys; I didn't see just exactly how the rail struck him. He got up. He could hardly scarcely limp along, and a great piece cut out of his finger.

Q. State now whether they had any signal man there to signal between the winchman and the men working on the dock?

A. They had no signal man.

(Testimony of E. Ferguson.)

Q. Do you know whether there was any freight on that boat belonging to Swayne & Hoyt, with their names on it?

A. Oh, yes, there was some.

Q. What?

A. There was some freight for Swayne & Hoyt.

Q. Did any one give any notice to you that they were going—the winchman was going ahead with the load? Did you receive any notice from any one?

A. No.

Q. I wish you would state, if you can, any circumstances attendant to the unloading of that iron beam which would show that it was dangerous work. That is a little leading, but I think you can get at this. [43]

Mr. Snow: Well, he has stated the facts, this witness has, everybody knows.

A. It was dangerous because they had no signal man there.

Court: That wasn't what he asked. He asked you what incident there was attendant. What happened at the time.

Mr. Snow: Just tell what happened, that is all; what occurred.

Q. Well, what is the fact about that?

Court: As to how they did the work.

Mr. Snow: How was the work done? That is the point.

A. Well, I said before how it was done, about

(Testimony of E. Ferguson.)

taking the rail up, it was dangerous work, because we didn't have a signal man. They ought to have a signal man.

Q. State whether it is the custom, or what the custom is, where winchmen cannot see the engineer, whether it is the custom to have a signal man to signal between the men in this port?

A. Custom to have a signal man; any kind of ships where the winchman can't see, always have a signal man.

CROSS-EXAMINATION.

Questions by Mr. Guthrie:

You signed this payroll here, didn't you?

Mr. Giltner: I object to that. I never asked any questions about that. It is not proper cross-examination. He can call him as his own witness, but it is not proper cross-examination.

Court: Let him testify.

Q. You testified you were employed in this particular transaction, didn't you?

A. Sir?

Q. You were working at this particular time, weren't you?

A. Yes, sir.

Q. And you signed this payroll?

A. I don't know whether I drew my pay for that time. Sometimes we are working the next day, and we have the business agent draw our money.

Q. In any event—take this one. [44]

(Testimony of E. Ferguson.)

Mr. Giltner: Is this the one in evidence?

Mr. Guthrie: It will be. This is in evidence. Is that your signature down at the bottom?

Mr. Giltner: Is that the one that has been introduced in evidence?

Mr. Guthrie: Yes sir, this is steamship, Voyage No. 12.

A. Yes, this is the one that was introduced. I guess Schneider did.

Q. You think Schneider did?

A. Yes, sir.

Q. You are familiar with this kind of payroll?

A. Not very familiar. I haven't drawn my money very often. The business agent does it.

Q. Then these signatures are not yours? This one you don't think you signed. Look at the second one there. Is that your signature?

A. I don't think so.

Q. Well, there is no initial behind that. Look at it.

A. That is not my name.

Q. Your name is not Ferguson?

A. My name is Ferguson, but you look at the initials.

Q. He has the "E" in there?

A. Yes, but got an "H" too, hasn't it?

Q. I think the other man has too. That is what I am trying to find out.

Gustav Barsch, having been sworn as a wit-

(Testimony of Gustav Barsch.)

ness in his own behalf, testified substantially as follows:

DIRECT EXAMINATION BY MR. GILTNER.

Q. Are you the plaintiff in this case? [45]

A. I am.

Q. State if you had any business relations with the defendant, Swayne & Hoyt. [46]

A. I have.

Q. On or about the 31st day of March, 1913?

A. I had.

Q. Just tell the jury the circumstances and facts about it.

A. We were called on in the morning by our business agent. He called for about, I think, it was something over 30 men to go down for Swayne & Hoyt people, and work on Alber's Dock No. 3, steamship Camino. When we went there, we were put to work on the dock, by Mr. Dosch, the general foreman. He places the men, men sorting freight and others were trucking, and others were landing the load, the same as I. I was landing the loads. I took general cargo out that day, up to about 7 o'clock that evening. We worked from seven to twelve. Twelve we go to diner, and start at one. From one we work till five. At five o'clock we went to supper, and come back at six. From six we work until a little after seven on general cargo. After that, we start at the structural iron. Now, when we hoist these beams, there is two directors attached to the mast.

(Testimony of Gustav Barsch.)

The end of the director, the top of the director, is attached by lift to the top of the mast, and the winches are in front of the mast, two winches. Hand winches handling.

Q. What are they operated by—what power?

A. By steam. They are called friction engines, as a rule. The cable runs from the drum of the winch thru a block to the heel of the director, and through the block above on top of the director, and come down and are connected by shackle, and the shackle is connected by swivel, and that swivel is attached to the hook, and to keep the falls from coming together, rolling up like a rope, there is a swivel above the hook, and when we take these iron beams out there are two chains. They come together in the hook, and top from that back link or ring, what you might call, leading out this way when the iron is slung. One leads this way, the other that way, and each attached to a hook. Them two hooks are attached to the steel, a steel beam, and the winch driver goes ahead with the offshore fall. The beam is mostly on the offshore [47] side. You see them beams are not directly over the hatch, because in dragging loads out of the ship, they are spread out. They are long beams, and will spread out. He goes and hoists out with both winches, both winches go ahead, and as soon as it is *a* high as the hatch combing, the inshore winch takes the weight, and falls it over towards the dock. In most cases the load will swing,

(Testimony of Gustav Barsch.)

especially beams. They can't spread well, be steady, and they are swinging around in a circle. Sometimes they strike the dock, and sometimes injure the dock.

Q. What happens when they strike the dock sometimes?

A. Well, they may split those boards in the dock, and they may strike some men that are working there; therefore you have to be out of sight. The beams are lowered low enough so the men who are landing them can get hold and steady them, and load them on these trucks. The trucks has four wheels about eight feet long, and got a handle attached to it on the end. The handle is towards the inside of the dock. The truck is run back out to the front of the dock; when that beam is landed, we unhook the front hook. I was on the inside of it, the inside of the dock. I unhooked the front hook, and let it slip down on the rail, and got hold the beam handle as is the custom, to pull, because it takes some pulling to get over a rough dock, and there when I had hold of it, this winch driver went ahead without any notice, didn't give us any notice at all. I didn't hear and didn't see anything until I was knocked down, struck me partly here on this knee, and took a piece out of this finger here, and took a long time to heal up. And it was about half-past seven that evening.

Q. I wish you would state now, who was working there on the dock with you?

(Testimony of Gustav Barsch.)

A. There was quite a few men working. My partner particularly; Mr. Wolff was my partner.

Q. Was Mr. Ferguson there?

A. Mr. Ferguson, yes. It was duty to take the loads away from us. [48]

* * * * * *

Q. Now, Mr. Barsch, I will ask you if you had—if you ever visited Swayne & Hoyt?

A. I did.

Q. Tell the jury the circumstances under which you visited them and where you went.

A. I went to Mr. Kennedy here first, and Mr. Kennedy gave me a letter [49] of introduction to Swayne & Hoyt in San Francisco. The offices were located on Sansome Street, and I met the—I went to the office, and gave the letter to the clerk, the head clerk there, the chief clerk.

Q. Who was the letter addressed to?

A. Addressed to Swayne & Hoyt, and I gave it to him, and he says “Wait a minute,” he says, “until Mr. Moran is in here. He is the general manager here and he attends to these cases.” I waited until Mr. Moran came and he says, he says to me, he says, “Are you Mr. Barsch”? I says, “Yes, I am the man that is working for Swayne & Hoyt people in Portland, unloading the steamship Camino.” “Yes,” he says, “I heard about that.”

Mr. Snow: Wait a minute. What is this conversation you are asking about, Mr. Giltner?

Mr. Giltner: He is stating.

(Testimony of Gustav Barsch.)

Mr. Snow: With whom?

Mr. Giltner: Mr. A. A. Moran, one of the officers of the Swayne & Hoyt Company.

A. Represented to me as the general manager.

Q. Well, go on and state what the conversation was.

A. I say, "I am the man that was working for Swayne & Hoyt in Portland, unloading the steamship Camino, and I got hurt." He said, "I heard about that." He says, "How bad were you hurt?" I said to him, made a statement to him, he says, "Well, I am very busy today. Come back in a few days, or day after tomorrow, and I will look into this case." I came back a few days later, I think it is about two days later or so. I come back to him about ten o'clock in the morning, and I waited there until twelve o'clock. Mr. Moran did not show up. At twelve o'clock I seen him. I says, "I am here. I want to get some information from you." "Well, yes," he says, "I haven't—I have been very busy, and I haven't looked into your matter yet, and I will be having it done right away." Finally he commenced talking. "I am very busy," he said again. "I am very busy today. Can you come back at ten o'clock tomorrow, and [50] I will be at liberty to attend to your case for you and will go to our lawyer and settle our case."

* * * * *

Q. You came back the next day at ten o'clock, you say?

(Testimony of Gustav Barsch.)

A. I came back the next morning at ten o'clock.

Q. Waited how long?

A. Waited until three o'clock in the afternoon. I asked the clerk, "Has Mr. Moran been here?" I waited all the time there. "Has Mr. Moran been here?" "No, I haven't seen him." Well I got rather angry.

Q. You don't need to state what you said to the clerk, but you waited until three o'clock?

A. Yes.

Q. What did you do then?

A. I went out and said to the clerk, "I am going back to Portland tonight and take such action as I see fit." And I went out the office door and I wasn't gone more than twenty steps when out comes Mr. Moran and hails me and said, "Come back here." I went back to him, and he says "Now you are the man." "Yes," I say, "I am Mr. Barsch." "I am Mr. Moran," he says. "Yes, I know all about that," he says. "I will give you a letter, I will send you up to our lawyer who settles all our cases for us." And he sent me up to Mr. Campbell.

Q. Mr. Campbell the lawyer?

A. A lawyer, and which building it is in I don't know. It is Mr. Campbell the lawyer. I went up and stated the case. Mr. Campbell said to me—

Q. Did you get any settlement from Mr. Campbell?

(Testimony of Gustav Barsch.)

A. Mr. Campbell say—

Q. Don't state what he said.

A. No. [51]

Q. What did you do then?

A. I came back. Well, if I can't relate the whole matter.

By the Court: You came back to Portland?

A. I came back to Portland and came up to Mr. Kennedy's office.

Q. What did Mr. Kennedy do?

A. Mr. Kennedy says, "Here, come in my automobile and we will go up to the doctor. I got notice from San Francisco to take you to the doctor here in Portland. And we went to a doctor. [52]

Q. Did that doctor examine you?

A. The doctor examined me.

Q. What did you do afterwards?

Mr. Snow: What doctor was that?

A. A doctor here. I don't know.

Mr. Snow: Dr. Hamilton?

A. That may be his name. I don't know exactly his name.

Mr. Snow: Where was his office?

A. I don't know. His office was somewhere—

Mr. Snow: Well, never mind.

A. I don't know exactly where his office was.

Mr. Giltner: Well, you can cross-examine on that.

Q. Well, did you go and see Mr.—you don't

(Testimony of Gustav Barsch.)

need to state what was said—did you go and see Mr. Kennedy after that?

A. I did.

Q. How many times?

A. I went there about four times, I guess, four or five times.

Mr. Snow: Nothing came of all this. What is the good of going into it? It is wholly immaterial.

Court: Unless there was some admission on the relation of master and servant.

Q. Now, what did Mr. Campbell—what did Mr. Kennedy do after you saw him—after you had seen the doctor?

A. Mr. Kennedy said to me he was going to send a night letter right away that night to Swayne & Hoyt in San Francisco, and he waited an answer, and he told me to come back in a day or two, and he would surely have an answer.

Q. What to do?

A. Yes, sir, what to do.

Q. I mean what to do—what were you trying to do?

Mr. Snow: I object to that. No settlement there.

A. We were trying to get a settlement. [53]

Mr. Giltner: I think so; circumstances—he was negotiating.

Court: Suppose he did. We don't want to go into their intention to settle. That wouldn't be competent.

(Testimony of Gustav Barsch.)

Q. Who was the dock foreman over you?

A. Mr. Dosch.

Q. And who was the general superintendent over all of you there?

A. The first officer.

Q. Whom did you say?

A. The first officer—the name was Ahlin.

Q. The mate?

A. Yes, the mate.

Q. Did you take orders from him?

A. Yes.

Q. And also from Mr. Dosch?

A. Yes.

Q. How old are you?

A. Fifty years.

Q. How old were you when this accident happened?

A. 49.

Q. How much were you earning a month?

A. A month? About \$100.00.

Q. Did you have steady employment?

A. Well, pretty steady.

Q. Would you average \$100 a month during the year?

A. I guess I did, probably.

Q. Now, I wish you would state, Mr. Barsch, whether you were given any notice by any one that the winch driver was going ahead with this load that struck you?

A. No notice given whatever.

Q. State, Mr. Barsch, what, if anything was

(Testimony of Gustav Barsch.)

there that would prevent the winch driver from seeing you while you were working at the time the accident happened? [54]

A. The ship was above the dock.

Q. How high?

A. Oh, I should think about seven or eight feet, and the winch driver is situated in the middle of the ship, and he cannot see over the ship's side.

Q. What were your duties, Mr. Barsch, on the dock there? What did your duties call you to do?

A. Landing those loads what come out of the ship onto four-wheeled trucks.

Q. And state to the jury how you would land them. Would the load be in the air, or how would you do it?

A. When the load come out of the ship's hold with the offshore winch fall or the inshore winch fall, we get hold of it as soon as it gets above the hatch combing, and the offshore fall will slack away, pulls it out, and as soon as it is clear of the ship's rail, it is lowered down sufficiently so we can get hold of it; we get hold of the load.

Q. Is that before it strikes the dock, you get hold of the load?

A. Yes, sir.

Q. You have to take hold of it?

A. Yes, we got to take hold.

Q. While it is swinging in the air?

A. Yes and we get hold, and steady the load and land it. And after it is landed, we will nip

(Testimony of Gustav Barsch.)

the sling, if general cargo, we nip the sling on top, and one man holds that nip of the sling, and the other man gets hold of the handle, and pulls the load in, the two of them. One of them shoving and the other pulling.

Q. Now, did you at any time give the engineer or winchman, or did any one give the winchman any notice to go ahead?

A. At that particular time?

Q. Yes.

A. Not that I know of.

Q. Did Mr. Wolff give him notice to go ahead? [55]

A. No.

Q. Did Mr. Ferguson?

A. Not to my knowledge.

Q. Did you?

A. No.

Q. Were you prepared for him to go ahead at the time the accident happened?

A. No.

Q. How large a beam was this?

A. It is a beam about 16 or 18 feet long. What is called structural iron; it is double T iron; say, for instance, that this is the middle of the beam, and there is a flange extending on each side that way, take both hands there, the flange there, and the flange over here on this side, extending about three inches over the center, flat part of the beam.

Q. Did they have a signal man there at the time?

(Testimony of Gustav Barsch.)

A. There was none.

Q. Did they at any time have a signal man there?

A. No.

Q. Now, how did you do this work before?

A. We hollered to the winch driver to come back, or go ahead, as the case required.

Q. What is the custom in loading and unloading vessels, cargoes of vessels in this port, where the winchman is not able, or not in position to see the men working on the dock or in the hold, as to having a signal man to signal between them?

A. It is a custom; it certainly is.

Q. Mr. Barsch, what effect has this injury to your leg had upon you, in your following your vocation? What effect has it upon you, in your being able to follow your vocation?

A. No, not the same extent—I can't follow it because I am not able to.

Q. What is your—what are your duties generally as a longshoreman? [56] What do you do?

A. There was a time I am carrying wheat or stowing wheat in a ship or loading lumber.

Q. What do you do? Does that necessitate you to lift it, and carry it?

A. Yes, you get the weight on your shoulder.

Q. What effect does that have upon you, if you would carry a heavy weight upon your shoulder—upon this leg?

(Testimony of Gustav Barsch.)

A. It would make it stiff; got continual pain in there, makes it stiff; it is a numb feeling.

Mr. Snow: He has gone over all that.

Mr. Giltner: No, not that feature he didn't.

CROSS-EXAMINATION.

Questions by Mr. Guthrie:

Mr. Barsch, where did you say you lived in Portland?

A. 113 Ninth Street.

Q. Near the corner of Ninth and Glisan?

A. Yes, sir.

Q. And about what had been your earnings before you were hurt?

A. About \$100 a month.

Q. And about how many days in the month did you work? About how many days a month, ordinarily, would you average?

A. Averaged? I averaged from twenty-two to twenty-five days, except worked a good deal Sundays, too.

Q. And what is the prevailing wage that you received?

A. The prevailing wage is different wage scales.

Q. As a wheat man, what was your wage?

A. Fifty-five cents an hour.

Q. As a lumberman, what was your wage?

A. Fifty cents an hour.

Q. What did you get on overtime?

(Testimony of Gustav Barsch.)

A. Overtime on wheat was \$1.00 an hour, and lumber \$0.75 an hour. [57]

Q. Now, you have had a good deal of experience in longshoring, haven't you?

A. I have.

Q. How many years have you worked here in Portland?

A. Here in Portland? Let's see. I started to work in 1890, and worked until 1897, I think.

Q. Have you worked since then?

A. Oh yes. I didn't work in this place.

Q. Steadily here?

A. No. I didn't work in this place alone. I worked in other places.

Q. Well you have worked on pretty nearly all the different boats that come into Portland, one way and another?

A. Yes, and different ports.

Q. Have been on steamers and on all kinds of sailing craft too?

A. Have worked on steamers, and sailing craft too.

Q. And steam schooners, such as the Camino and Navajo. You worked independently on those boats, and not under master stevedores, the same as you worked for the Stevedoring Company.

A. For the Stevedoring Company.

Q. You work under Brown & McCabe sometimes, don't you?

A. Yes, sir.

Q. And the McCabe Company as well?

(Testimony of Gustav Barsch.)

A. Yes, sir.

Q. And you worked independent on these different boats?

A. Yes, sir.

Q. The Arrow Line?

A. Yes.

Q. And the Paraiso, and some of those?

A. Yes.

Q. So you had a great deal of experience?

A. Yes.

Q. Now, you say you went down to work on the Camino for Swayne & Hoyt? [58]

A. Yes.

Q. Who told you that you were going down there to work for Swayne & Hoyt?

A. I seen Swayne & Hoyt's name on the bow of the Camino.

And when you saw that name on the Camino, that is the way you knew you were working for Swayne & Hoyt?

A. Why, certainly, must be the way. If you see a name on the ship, that is the company.

Q. Well, you saw the name there, but as I understood it, that name said "Manager." It didn't say they operated the boat for themselves, but said "Manager," didn't it? Didn't it say "Swayne & Hoyt, Managers?"

A. Swayne & Hoyt, Managers?

Q. Swayne & Hoyt, Managers.

A. I guess it may be that. I only looked at

(Testimony of Gustav Barsch.)

the Swayne & Hoyt name. May be Swayne & Hoyt, Managers.

Q. So you were sure you were working for Swayne & Hoyt?

A. Yes.

Q. You felt you were sure of that, and you looked to them for your compensation?

A. Yes.

Q. And if you hadn't been paid, you felt you could have sued Swayne & Hoyt for it, didn't you?

A. Sure.

Q. And you would even have gone so far, if you had been obliged to, to have brought action against them to collect?

A. Yes.

Q. And you wouldn't have held the vessel for that work at all? You wouldn't have libeled the boat?

A. That depends on—I don't know enough about marine law; if I libel the ship, I can't libel the ship myself. I have to give it into some competent hands that would know the way about it. I wouldn't know how to go about that. [59]

Q. I know that, but the point is, whether you were looking to the ship as security for your wages as well, or whether working independently. Do you remember? You didn't think anything about it, as a matter of fact, did you?

A. I couldn't tell whether I looked to the ship

(Testimony of Gustav Barsch.)

or Swayne & Hoyt people, I couldn't tell. I left those questions to my lawyer.

Q. Then you are not so sure whether working for Swayne & Hoyt?

A. I was sure working for Swayne & Hoyt.

Q. You are perfectly sure of it?

A. Yes, sir.

Q. You were talking to Kennedy, and through that, you were working for Swayne & Hoyt?

A. Mr. Kennedy said "you were working for Swayne & Hoyt."

Q. He gave you a letter to Swayne & Hoyt when you went south?

A. Yes, sir.

Q. And you expect by that to show you intended Swayne & Hoyt to stand for your damages?

A. Yes.

Q. That was your idea all the way through?

A. Yes, sir.

Q. Can you remember what time it was you were in San Francisco? Was it in May a year ago?

A. Yes, somewhere in May.

Q. Now, Mr. Barsch, do you recall the circumstances of your bringing an action for this same injury, in which you filed a complaint stating the same facts that you state today in this court, in the state court, in which you swear over your oath, that you were employed by the American-Hawaiian Steamship Company; and you sued

(Testimony of Gustav Barsch.)

the American-Hawaiian Steamship Company, through your attorneys, Giltner & Sewall, in a complaint verified by you on the 18th day of July. Now, why did you sue the American-Hawaiian Steamship Company, if you knew you were working for Swayne & Hoyt? [60]

A. I will leave that to my attorney to answer that question.

Q. Then you didn't know whether you worked for Swayne & Hoyt on the 18th day of July last?

A. 18th day of July?

Q. I have a complaint here, a certified copy, from the state court, which says the 18th of July. If that isn't correct, I would like to know. It is verified on the 18th of July, and it says, "Filed July 18, 1913." How, there is an action in which you swear, among other things, that you were employed by, and were working for, the American-Hawaiian Steamship Company, assisting in unloading structural iron beams, about 18 feet long, and weighing about 800 pounds each, from the steamship Camino onto a truck on the dock, and after the same were landed upon the dock, taking them away and storing upon the dock; and then you go on in almost the identical words of the action you have here now against Swayne & Hoyt. Now, you weren't so sure whether Swayne & Hoyt when you sued the American-Hawaiian Steamship Company, were you?

(Testimony of Gustav Barsch.)

A. I wasn't so sure.

Q. Then why did you say awhile ago, you knew it was Swayne & Hoyt?

A. I knew it was Swayne & Hoyt—I seen the name on it.

Q. Then why didn't you sue Swayne & Hoyt on the 18th day of July?

A. I leave that to my lawyer to answer that.

Q. As a matter of fact, you didn't know anything about it—isn't that the fact, Mr. Barsch?

A. Oh no.

Q. Then why did you sue them? You must have known something about it. You have put your name here to a note you did know these facts now; why do you say you don't? You remember bringing this suit against the American-Hawaiian people, don't you?

A. I think there was an action taken against them. I am not sure.

Q. You can't remember that far back?

A. I left this over to my lawyer. I says to him, "I have got a damage [61] suit," and he looked the matter up.

Q. And Mr. Giltner investigated these matters for you, I suppose, did he?

A. I guess so.

Q. You didn't tell him the facts about Swayne & Hoyt? Is that right? Didn't tell him this you tell today, you now say Swayne & Hoyt, because you went down and looked at that Arrow on the boat?

(Testimony of Gustav Barsch.)

A. What is that?

Q. You didn't tell Mr. Giltner last July, when you sued the American-Hawaiian people, how you went down there and saw a painted Arrow, with Swayne & Hoyt's name on the boat. Is that right?

A. I don't know whether I did or not.

Q. You don't remember what you told him. Then why did you let him—you told Mr. Giltner you had been down to San Francisco, didn't you?

A. Yes, sir.

Q. And you told him you had been to the office of Swayne & Hoyt there, didn't you?

A. Yes, sir.

Q. And you talked to Mr. Moran?

A. Yes, sir.

Q. And you came back and talked to Kennedy again?

A. Yes, sir.

Q. All for Swayne & Hoyt?

A. I don't know—

Q. Oh, you don't know whether Swayne & Hoyt—

Mr. Giltner: Wait a minute; give him a chance to answer. What were you going to say?

A. I don't know. I was under the impression to sue both companies.

Mr. Giltner: That is right.

Q. You thought you would sue both companies?

A. I didn't know exactly whether they were

(Testimony of Gustav Barsch.)

operated by Hawaiian Company, or whether they were operated at that time directly by the Swayne & Hoyt people. [62]

Q. And you found you were mistaken about the American-Hawaiian people, is that right?

A. I was mistaken.

Q. And you might just as easily be mistaken now about Swayne & Hoyt?

A. No.

Q. Why shouldn't you?

A. No, no mistake there.

Q. What difference can there be?

A. The difference be because they acknowledged they had; they acknowledged it.

Q. When did they acknowledge it?

A. In San Francisco, when I was there.

Q. Why did you come back and sue the American-Hawaiian people two months afterward then? If they acknowledged for Swayne & Hoyt, why did you come back and sue the American-Hawaiian people?

A. At that time?

Q. Yes.

A. I don't,—I left everything to Mr. Giltner, and didn't care about it any more—didn't bother any more. Didn't go up to his office, and I left that.

Q. Now, as a matter of fact, in all of this matter, put in a short way, is this: You didn't know who you were employed by, but were working for the steamship Camino. Isn't that a fact?

(Testimony of Gustav Barsch.)

Don't know whether the American-Hawaiian Company, or whether Swayne & Hoyt, or not. You knew you were working for the steamship Camino. Isn't that a fact?

A. I was working for Swayne & Hoyt, I found out afterwards.

Q. After you found out, you sued the Hawaiian Company?

A. No.

Q. You mean to say, on July 18th, then, you didn't file this complaint; you didn't sign your name, and verify a complaint in the state court?

A. Yes.

Q. You did? [63]

A. If my name is there, I guess I signed it.

Q. Yes, this copy shows, certified by the officers of the state court, you did. Now, that was two months after you had been down to San Francisco, or nearly, from May to July.

A. Yes, May to July.

Q. Now, if you were sure it was Swayne & Hoyt, I say again, why did you sue the American-Hawaiian Company?

Mr. Giltner: I think there should be some end to this. He has asked it seven or eight times. He said he left it to the attorney. That was the best answer he could give, and his attorney said he could sue one or both.

Mr. Snow: We wish to go on.

Court: I think he has answered as well as he can.

(Testimony of Gustav Barsch.)

Mr. Giltner: He has answered as well as he can. I will explain it.

Mr. Snow: Well, you will go on the witness stand before you explain to this jury.

Q. You had worked for the steamship Camino, hadn't you, before that particular trip?

A. I had.

Q. And you had gone up to Mr. Kennedy's office and gotten your pay, hadn't you?

A. Yes.

Q. You are able to write your own signature, aren't you?

A. Yes.

Q. You are able to read your own handwriting, aren't you?

A. Yes.

Q. And you would recognize it if I showed it to you?

A. Yes.

Q. So I will show you now, Mr. Barsch, a payroll for Voyage No. 4, Camino.

Mr. Giltner: I object to that as not in evidence here.

Mr. Guthrie: We are going to use it in a minute. Wait a minute.

Court: Let him see it. [64]

Q. On which I show you, on the second page, signature "G. Barsch." I will ask if that is your signature?

A. Yes, that is my signature.

Q. And this purports to show you drew pay?

(Testimony of Gustav Barsch.)

A. Yes.

Q. And you signed this in Mr. Kennedy's office?

A. Yes, in Mr. Kennedy's office.

Q. You would be able to know what that was when you were looking it over?

A. I don't look at anything. The clerk put this in front of me, and I signed it.

Q. No reason why couldn't read it if you wanted to, was there?

A. We was not asked to read that.

Q. That is true; but you do not sign your name on being asked, to anything?

A. They only said to me to sign this payroll. "You got so much money, sign this." They put it in front of you, you sign your name, and they take it away.

Q. Do you make a practice of not reading what you sign?

A. The payroll, as long as I see my money is correct.

Q. You don't care where you get it from. Whether it says the steamer Camino, or the steamer Navajo, you don't care.

A. If I am not working for them, it would be different.

Q. Then you didn't read this. Is that what I understand?

A. Yes, as much as—when we go in this office, Mr. Kennedy or his clerk says, "This is the

(Testimony of Gustav Barsch.)

payroll for the steamer Camino” or any other steamer, sign it.

Q. So you know you are signing for the payroll of a steamer?

A. Yes, been working there.

Q. And the fact is, you were working for that steamer?

A. I was working there on the dock, helping the unloading that steamer Camino.

Q. The clerk says, “Here is a payroll for the steamer?” [65]

A. Yes.

Q. You sign your name, that is all. Is that right?

A. Yes, that is all.

Q. So you knew, from what the clerk told you, you were working for the steamer?

A. No, didn't say we were working for steamer. Was unloading for Swayne & Hoyt, as much as I understand.

Q. Did the clerk tell you you were working for Swayne & Hoyt?

A. It is their steamer.

Q. I don't think you are qualified to say, is their steamer.

Mr. Giltner: The steamer didn't pay you.

Mr. Guthrie: I think the best evidence would be the payroll.

Court: I suppose it is the same as in every office. They pass out the payroll and say sign it, and they never look.

(Testimony of Gustav Barsch.)

Mr. Guthrie: I offer this in evidence, No. 4.
Marked "Defendant's Exhibit B."

Q. This is your signature on Exhibit A. This is your signature about the middle of the page on this one?

A. Is that the same one?

Q. No, this is another. This is No. 12.

A. Yes.

Q. Is this your signature, is all I want to know.

A. The signature is right, but the pay is not right.

Q. Well, I don't care about that. The only thing is whether this is your signature.

A. I didn't take the pay at all from that steamer.

Mr. Giltner: What is that?

A. I didn't take the pay from that steamer until ten weeks after on that payroll.

Mr. Giltner: When did you sign that?

A. I signed under protest. It was put to me to sign that payroll so they could forward to San Francisco. I signed it about three weeks [66] afterwards, after it was made out; three weeks after the steamer left, I signed it under protest. I says "I don't know why I signed here for and how it is coming out." I says "I am hurt and I don't know how it will come out, whether I sign this or whether I got a right to sign this or not." So I don't sign it, but the clerk told me, he says, "This payroll has got to go to San Francisco; got

(Testimony of Gustav Barsch.)

to go to Swayne & Hoyt in San Francisco, and we can't send it off," and he says, "You are the only one not signed." So under that protest I signed it, but didn't take the money.

By Mr. Giltner: Did you take the money?

A. No, I didn't.

Q. So when you protested then, you didn't even read it over to see what it was about?

A. The clerk told me it was the payroll.

* * * * *

Q. Mr. Barsch, you recall my referring to the action you brought in the State Court, yesterday?

A. In which court?

Q. You remember my referring yesterday to an action you had brought in the State Courts?
[67]

A. Yes.

Q. Against the American-Hawaiian people?

A. Yes.

Q. Do you know whether or not that action is still pending?

A. I guess *my* lawyer will answer that question, whether pending or not.

Mr. Giltner: I will say to you it is still pending.

Mr. Guthrie: Then I would like to introduce the certified copy of the complaint in evidence.

Mr. Giltner: I don't see what relevancy it has here. I desire at this time, if the Court please, to go on the stand and testify to that, but I don't

(Testimony of Gustav Barsch.)

want to waive my rights to address the jury. (To Mr. Guthrie) You can introduce this.

Marked "Defendant's Exhibit C."

Mr. Guthrie: I would like to read this to the jury so it may be understood. (Reads) "Gustav Barsch, Plaintiff, vs. American-Hawaiian Steamship Company, Defendant.

"Plaintiff above named, for cause of action against the defendant above named, complains and alleges:

First, that said defendant now is, and was, during all the times herein mentioned, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California, and as such by and through its agent was doing business in the City of Portland, Multnomah County, Oregon, during said time.

Second. That said plaintiff with others, on or about the 31st day of March, 1913, about 7:30 P. M. of said day, was employed by, and was working for the American-Hawaiian Steamship Company, said defendant, in assisting to unload structural iron beams about 18 feet long, and weighing about 800 pounds each, from the steamship Camino onto a truck on the dock, and after the same were landed upon said truck, in taking them away and storing them on the dock.

Third. That during the times herein mentioned, said steamship was berthed at a dock in the Willamette River, in Portland, Multnomah [68] County, Oregon, and that said steamship

(Testimony of Gustav Barsch.)

and its tackle, apparel, furniture and machinery, hereinafter referred to and mentioned were in the possession of, and controlled by said defendant for the purpose of unloading said iron and while the defendant and said plaintiff were unloading said structural iron beams, they were doing it by means of a double winch which was operated by steam power, and which was located upon the deck of said ship by an engineer and a foreman in the employ of said defendant, booms, cables, falls, hooks, slings. That in unloading said vessel, said sling and falls were fastened by means of a hook to each end of said structural iron beams, which said sling and fall were fastened or connected with a cable which would around the drum of said steam winch, and then said beams were raised by means of said steam winch and apparatus from the deck of said steamship into the air, and lowered over the rail of said ship down to and onto a truck on said dock, where said plaintiff and his fellow servants would receive, unloosen and place said beams upon said truck, and then remove them out of the way for the next load, and store them away and on said dock. That said work in which said defendant was engaged involved a risk and danger to the life and limb of said plaintiff and his fellow employees. That from the position he occupied on said vessel, the engineer operating said steam winch."—Now, the rest we can waive the reading to the jury.

(Testimony of Gustav Barsch.)

Mr. Giltner: Read it all.

Mr. Guthrie: I have no objection to it all being read. The only thing I want it clearly understood is, it is the same action, the same thing averred against the American-Hawaiian people, and it was verified at the end by Gustav Barsch that these facts were true July 18, 1913. If Mr. Giltner wants to read the rest, he can in the argument. [69]

* * * * *

Q. Did any one ever at any time tell you that the Western Steam Navigation Company was the owner—were the people that you were working for on the Camino when you were hurt?

A. I never heard of them.

Q. Never heard of it?

A. No.

Q. Did Swayne & Hoyt tell you?

A. No.

Q. Did Mr. Kennedy tell you?

A. No.

* * * * *

RECALLED ON DIRECT EXAMINATION.

Q. And who put you to work there that day when you went down there?

A. Where, on the dock?

Q. Yes.

A. Mr. Dosch.

Q. Now, Mr. Dosch assigned the longshoremen to their respective positions there?

(Testimony of Gustav Barsch.)

A. Yes, sir. [70]

★ ★ ★ ★ ★ ★

RE-CROSS EXAMINATION.

Questions by Mr. Guthrie:

Mr. Barsch, when you have worked on all these other boats, did you know who the owners were?

A. On the other—which other boats do you mean?

Q. Well, you say from time to time, different years you worked on other boats.

Mr. Giltner: That is incompetent.

Court: Let him answer.

Q. Did you know the owners of the Navajo when you worked on her?

A. I wouldn't know. The owners of the Navajo been changed recently, and been changed so very often, I couldn't tell.

Mr. Snow: Just answer the question.

Q. When you worked on the Navajo, did you know who her owners were?

A. Who her owners were that is? I don't know.

Q. As a matter of fact, did you ever know who the owners of the boats are, unless the boat was well-known in the harbor — everybody knows?

A. Yes, some boats will know the owners; others I don't.

Q. How would you know?

(Testimony of Gustav Barsch.)

A. Principally as stated in the guide that is hanging in our hall, that so and so did, and others it may not state the owners, and at times I read in the paper, in the newspaper, who the owners are.

Q. And you very frequently work on boats whose owners you don't know?

A. Yes.

Q. So it is nothing unusual that you didn't know who was the owner—that the Western Steam Navigation Company was the owner of the Camino?

A. Never heard of that company.

Q. Well, you never heard of the owners of some others of the boats either, did you?

A. What did you say?

Q. You never heard of the owners of some of the other boats, did you?

A. They are too many to recollect. I couldn't recollect it, the owner of every steamer that comes in here. [71]

R. Giltner, counsel for the plaintiff, and in charge of the trial of the case for the plaintiff, offered himself as a witness and testified substantially as follows: The question was asked Mr. Barsch yesterday as to why he had sworn to the complaint against the American-Hawaiian Steamship Company, in which he set forth practically the same allegations as set forth in the complaint against the Swayne & Hoyt people, and not being

(Testimony of R. Giltner.)

able to answer the question he referred it to his attorney.

I desire to state to the jury the reason why the complaint was filed for Barsch against the American-Hawaiian Steamship Company. Mr. Barsch came into the office and told me the circumstances of this injury. He told me that he was working for Swayne & Hoyt, he believed. At the time that I filed the complaint against the American-Hawaiian Steamship Company I knew that C. D. Kennedy was the agent of the steamship American-Hawaiian. I knew that the steamship Camino landed at the American-Hawaiian dock. I knew that Mr. Barsch was paid in Mr. Kennedy's office for the work he did on the Camino and I concluded from that—by knowing that he was the agent at that time—that I had a good cause of action against him. While I believed that the testimony against the Swayne & Hoyt people was stronger, I did not know at that time that there was a verbal agreement between Mr. Kennedy and the Swayne & Hoyt people that he should act as agent for them here. I wasn't able to prove the agency. I knew that in suing these people I might get something in regard to Swayne & Hoyt. I sued them and I knew as an attorney that I could sue them jointly or singly. I considered that I did not have sufficient evidence against Swayne & Hoyt outside of the direct contract of agency between Swayne & Hoyt and Mr. Kennedy. Mr. Johnson, attorney for Teal &

(Testimony of R. Giltner.)

Minor, after they were sued came over and saw me. He said "You have the wrong pig by the tail." I then went to see Mr. Kennedy and succeeded in getting from Mr. Kennedy a statement that he was acting as agent for the Swayne & Hoyt people at the time this accident happened and that the [72] Swayne & Hoyt people paid this man Barsch for his services on the boat at that time. I knew that, and I knew that the Swayne & Hoyt people were liable to this man and that is the reason why I sued, as I knew I could sue them both and had a right to sue them both under the law.

On cross-examination this witness testified in answer to questions propounded by Mr. Snow:

Now, Mr. Giltner this complaint was filed in the State Court about the month of July—July 18, 1913. You had talked with Mr. Barsch before you had filed this complaint in the State Court, hadn't you?

A. Yes, I did.

Q. Had he said anything to you about the American-Hawaiian Steamship Company?

A. He told me what I was trying to tell you here and you stopped me from telling. I say, yes he did.

Q. Wait a minute. He told you about the American-Hawaiian Steamship Company?

A. Yes.

Q. And he told you about the Swayne & Hoyt people?

(Testimony of R. Giltner.)

A. Yes.

Q. And he told you about the trip to San Francisco?

A. Yes.

Q. And he told you about his talk with Moran?

A. He did.

Q. And did he tell you about his talk with Mr. Campbell?

A. He did.

Q. He told you about that talk, did he?

A. Yes, that is not in evidence here though.

Q. Oh yes, it is.

A. Is it? Will you consider this in evidence?

Q. Mr. Barsch has testified to that. [Bill of Exceptions, b2] [73]

(By the Court: He spoke of the talk with Mr. Campbell.)

Q. Now, Mr. Giltner, when he came back from San Francisco, it was some time in the month of May, wasn't it?

A. I can't tell you about that.

Q. Refresh your recollection.

A. I can't because I don't remember.

Q. Well, he came back here before the month of July, didn't he?

A. Well, I would have to refresh my memory on that if I have any papers here that I can.

Q. Well, here is a certified copy of the complaint and if you have other data—

A. Hand it to me. I don't know when he

(Testimony of R. Giltner.)

came back, whether he did—whatever time that he signed any papers—why whatever the time I will admit that is the fact. Whatever that may be, you can state any time.

Q. I am only stating facts. I am not stating anything else.

A. I didn't accuse you of doing that, Mr. Snow.

Q. Wait a moment. We will get around to that. Now. Mr. Giltner, this complaint is verified July 18, 1913. This was some three or four months after this accident. Now, when he got back from San Francisco, he told you of his interview in San Francisco?

A. Later; later, yes.

Q. Now did you know—do you know that the Camino had labeled, or printed on her bow, as you say—

A. Yes he told me that was printed.

Q. Wait a minute. Wait until I get through my question. You are going off halfcocked. Wait until I get through my question.

A. I don't think you are warranted in making such a statement, that I am going off halfcocked.

Q. Wait a minute, and we will get to that. You are counsel in this case. Did you know at that time, at the time this complaint was filed, that Swayne & Hoyt's name was painted on the bow of the Camino "Swayne & Hoyt, Managers"?

A. I knew that Swayne & Hoyt's name was

(Testimony of R. Giltner.)

painted on the bow, but I didn't know "Managers." [Bill of Exceptions, b3] [74]

Q. Then this little tag that has been offered in evidence here by yourself, the little tag that indicates Swayne & Hoyt, Managers, which you say was posted on the bow of the vessel—the testimony shows was posted on the bow of the vessel—you hadn't seen that tag?

A. No, I got that tag yesterday from Mr. Williams.

Q. You hadn't learned anything at all about the fact?

A. Not the word "managers," no.

Q. But it appears "Swayne & Hoyt, Managers" is painted on the bow of the boat?

A. Yes.

Q. You knew that fact, did you?

A. Yes, and thought that a very significant fact.

Q. You didn't think it significant enough, though, to bring suit against Swayne & Hoyt at that time, did you?

A. I did not, for this reason.

Q. I didn't ask for the reason.

A. No, I didn't; and I want to give the reason, if you permit.

Q. You answer the question, and you can give the reasons later.

A. I have a right to give them now.

Court: You can explain afterwards.

Q. You can explain afterwards. Now, Mr.

(Testimony of R. Giltner.)

Giltner, when you filed this complaint against the American-Hawaiian Steamship Company, you knew, or supposed you knew all of the facts which Barsch had spoken to you about, of his visit to San Francisco which Barsch had spoken about; of his having been engaged by Swayne & Hoyt here, or Schneider had spoken of his being engaged by Swayne & Hoyt?

A. Schneider hadn't told me.

Q. Schneider hadn't told you?

A. No, it was only three days ago.

Q. You knew what—

A. I knew he always contended he was working for Swayne & Hoyt.

Q. You knew he said that?

A. Yes, I knew that. [Bill of Exceptions, b4]
[75]

Q. You knew he claimed to be working for Swayne & Hoyt?

A. Yes.

Q. And then brought your complaint against the American-Hawaiian Company?

A. Yes.

Mr. Giltner: I knew he always claimed he worked for Swayne & Hoyt, but I figured that those declarations, and the fact that the name might be painted on the prow of the boat, were not sufficient to bind these people as the employers of this man, nor would the declaration of Mr. Kennedy that he employed them. I knew that wouldn't be admitted in evidence here to bind

(Testimony of R. Giltner.)

Swayne & Hoyt, until I could prove before-hand that he was their agent. * * * * * And that I had no evidence of that kind, in order to bind them, and I considered the testimony weak as against Swayne & Hoyt, but I did know that he was agent for American-Hawaiian Steamship Company. I did know that he was paid at the American-Hawaiian office. I did know that the American-Hawaiian—that this boat landed at the American-Hawaiian Steamship Company's dock, and I satisfied myself that if I brought an action against these people that something might come out, whereby I could get them all, and I have got them all now.

Q. So you have.

A. And they are all liable.

Q. (By Mr. Snow:) Mr. Giltner, you are interested financially in this case, aren't you?

A. That is none of your business.

Q. Yes, yes, you are a witness in this case.

A. That is none of your affairs. I am interested, of course, as you are too.

Q. Are you interested financially in this litigation?

A. That is my look-out and not yours.

Q. You decline to answer that question?

A. I am interested, but the extent I am interested is none of your affairs.

Q. Then you decline to answer?

A. I decline to answer to you what I am

(Testimony of R. Giltner.)

doing, or what my business relations are to my clients.

Q. Have you an arrangement whereby you may get some benefits through this litigation? [Bill of Exceptions, b5] [76]

A. Mr. Snow, that is merely a technical question you are asking to prejudice this jury against my client. If I got all of that, Mr. Snow, it wouldn't have anything to do with whether or not my claim before this jury was a just one.

Q. I wouldn't be surprised if you did get it all. You decline to answer to this jury what your interest in this case is.

A. I decline to say what my agreement is with Mr. Barsch.

Q. You decline to testify you are financially interested in this case?

A. I want to say I don't work for nothing, but if a man comes to me, and he has a meritorious case, and he can't pay, I have to get my pay in some way or other, and if his case is meritorious, and he can't pay, I will take his case for nothing, and have done it frequently.

Q. Have you got this case for nothing?

A. No, I have not. I have his case on a contingent fee, if you want to know about that.

Q. That is all.

A. This is all done to prejudice the jury in this matter. I think the jury sees that.

The witness Giltner prefaced his evidence with the following statement:

(Testimony of R. Giltner.)

“The question was asked Mr. Barsch yesterday as to why he had sworn to the complaint against the American-Hawaiian Steamship Company in which he had set forth practically the same allegations as set forth in the complaint against the Swayne & Hoyt people and not *bine* able to answer the question he referred it to his attorney.”

Thereupon the plaintiff rested.

DEFENDANT'S EVIDENCE

A. R. Williams, a witness called in behalf of the defendant, having been duly sworn, testified substantially as follows: [Bill of Exceptions, b6] [77]

DIRECT EXAMINATION BY MR. GUTHRIE.

Q. Mr. Williams, for whom were you working and what was your vocation on or about the 31st day of March, 1913?

A. I was working for two companies at that time. I was working for the American-Hawaiian Steamship Company and—

By Mr. Giltner: What is that? [78]

A. I was working for two companies, was working for the American-Hawaiian Steamship Company and also was working for Swayne & Hoyt.

Q. What was your position, Mr. Williams?

A. In working for American-Hawaiian Steamship Company, I was receiving clerk, and in

(Testimony of A. R. Williams.)

working for Swayne & Hoyt, I was time keeper, or assistant supercargo, or foreman.

Q. And as time keeper, was it your duty to make these payrolls?

Mr. Giltner: I object to leading the witness.

Mr. Guthrie: I don't care to kill a lot of time with this.

Court: Go ahead.

Q. Was it your duty to make up the payrolls?

A. It was.

Q. And are these payrolls, exhibits A and B of defendant's, signed A. R. Williams, prepared by you?

Mr. Giltner: Let's see that last exhibit you put in.

Mr. Guthrie: All right; he has it in his hand.

A. This payroll is not in my handwriting.

Q. Is this one?

A. It is, yes, sir.

Mr. Giltner: Which one is this?

A. This is Voyage No. 4 and this is Voyage No. 12.

Mr. Guthrie: He identifies Voyage No. 12.

A. Yes, I made up that payroll myself there.

Q. And does the payroll show accurately the amount of work done, the number of hours and pay due each man?

A. It does.

Q. Do you remember the circumstances of Gustav Barsch, a longshoreman who claims to

(Testimony of A. R. Williams.)

have been injured on the dock about the 31st day of March at 7:30 in the evening?

A. Yes, sir, I do.

Q. At what dock was that?

A. That was a dock called Albers No. 3. [79]

Q. What steamship was being unloaded?

A. The Camino.

Q. Will you describe and tell the jury what cargo was being taken from the steamship at the time?

A. You mean at 7:30 in the evening?

Q. At the time Gustav Barsch claimed to have been injured.

A. Steel girders, about 18 feet long, and called eye beams, with a flange on both edges.

Q. The testimony of one of the witnesses yesterday, Mr. Wolff, said these girders were directed to Swayne & Hoyt. Do you recall whether that was the case or not, whether they were marked "Swayne & Hoyt"?

A. No, sir, they were not.

Q. What were they marked?

A. They were marked "Northwest Steel Company."

Q. And the shipment was to the Northwest Steel Company of this city?

A. Yes, sir.

Q. Do you know if there was any cargo being taken out of the hold of the vessel at that time that was shipped as Swayne & Hoyt's goods?

A. Not as Swayne & Hoyt's goods. Once in

(Testimony of A. R. Williams.)

awhile you would find a case would be marked "Care of Arrow Line," or "Shipped via Arrow Line."

Q. That would be some goods that were trans-shipped would it; having been started by another route, and then carried subsequently by the Arrow Line?

A. Either that way or routed in San Francisco. For instance, if I would ship goods to you from San Francisco, to Portland, I would mark the goods "Care Arrow Line."

Q. I wish you would tell the jury what you know of the circumstances of Mr. Barsch's injury. When did you learn of it? And what was told you by Mr. Barsch at the time.

A. I was on the deck of the ship at the time, and didn't know about the accident until after it had happened, and I immediately went down to Mr. Barsch and told him he had better go home; then I thought better of [80] it and asked him to come up into the mate's room where we could dress his finger. His finger was bleeding badly, and the first officer or mate of the ship, Mr. Ahlin and I, took Mr. Barsch up in the mate's room, and as he said about cutting the piece off of his finger, we did that, dressed it with Fryes Balsam and wrapped it up, and Mr. Barsch complained of his knee. That was after we had his finger dressed, and I asked him to roll up his trousers so we could look at his knee, and he hesitated about doing it at first; then he rolled up his

(Testimony of A. R. Williams.)

trousers and we looked at his knee, and at that time there was no apparent injury to his knee; we could see nothing the matter with it, but he complained of it hurting him, and walked with a limp at that time, but we could see nothing the matter with it at all. I told him to go home, and I let his time run on until the gang that he was working with finished. You see that was about 7:30, and the gang that he was working with, I think, finished at eleven that night. I am not positive, but what I meant, I think his time run on to eleven o'clock. Told him if he felt in condition to come back the next day again, and if not, stay home. He didn't come back the next day, and that is all I know of the case until I was subpoenaed on it.

Q. Now, do you recollect whether or not at the time Mr. Barsch exhibited his knee to you if there was any swelling present at the time?

A. Not at that time, no.

Q. Do you recall a statement that you made to Mr. Barsch to the effect that his knee was in bad shape and was already swollen up?

A. I couldn't have made that statement because—

Q. Did he make such statement?

A. No.

Q. Did you make such a statement to him?

A. No.

Q. You say you allowed his time to run on until the end of that gang that night?

(Testimony of A. R. Williams.)

A. Yes, sir. [81]

Q. So that the payroll time as made up there for Voyage No. 12 would include his time up to and including eleven o'clock of that evening?

A. If that was the time they finished. I am not positive of that.

Q. Until the end of that gang.

A. Yes, sir; it should, unless I made a mistake and left it out. It was my intention to do that.

Q. The amount of money against Mr. Barsch's name shown on that payroll is more, if anything, than the actual time he worked.

A. It should.

Q. The statement was made by Mr. Barsch yesterday the amount of money was incorrect in that payroll. Do you know whether that is the fact or not?

A. No, I do not. Might possibly have been a mistake. There is sometimes mistakes in payment, same as anything else, inaccuracies.

Court: Mr. Barsch's testimony, as I understand, is he didn't receive the money when he signed the payroll.

Mr. Guthrie: Said the money was wrong.

Court: Said he wasn't paid at that time.

Q. Now, you recall a few days ago being in Mr. Giltner's office?

A. Yes.

Q. Was Mr. Schneider present?

A. Yes.

Q. Did you go there with Mr. Schneider?

(Testimony of A. R. Williams.)

A. No.

Q. Were you talking with Mr. Schneider when you were in Mr. Giltner's office?

A. No.

Q. Did Giltner say anything to you about this case?

A. Yes, he did.

Mr. Snow: He didn't ask what he said.

Mr. Giltner: State all I said, what I said. I give you permission. [82]

Mr. Snow: We don't want that.

Mr. Giltner: What you talking about then.

Mr. Guthrie: All I want to know is whether or not you did talk?

A. Yes, we did talk.

Q. Did you hear Mr. Schneider say anything about this case?

A. No, I don't remember Mr. Schneider saying anything.

Q. He was present there with you at that time?

A. Yes.

Q. Now, in this matter of Mr. Barsch's complaint made to you that evening, did he indicate to you that his injury was serious?

A. No, he complained of his knee, and as far as the injury to his finger was concerned, why, I considered that a minor injury.

Q. What is your custom when men are injured, and the injury is at all serious?

(Testimony of A. R. Williams.)

Mr. Giltner: I object to that. I don't think it is competent, what the custom is.

Court: State what was done at that time.

Q. Do you make a report of it in such cases?

A. I do.

Q. Did you make a report in this case immediately?

A. I did not.

Q. Why not?

Mr. Giltner: I object, as incompetent, immaterial and irrelevant.

Court: Let him state why he did not do it.

A. Because I didn't think that the injury necessitated making a report of that kind.

Mr. Giltner: I move to strike that out. I don't think it is competent.

Court: That isn't important. His opinion is of no consequence in this case, except so far as the accident occurred. Tell what occurred and what he saw.

Q. Did the complaint made to you by Mr. Barsch assume such an aspect of [83] seriousness that you were moved to make a report that evening?

Mr. Giltner: I object as calling for the opinion of the witness on an immaterial proposition.

Court: He can testify to what Mr. Barsch did, what claim he made; what he said about it. That is as far as the answer should go.

Q. There has been some testimony in this case, Mr. Williams, about the custom of unload-

(Testimony of A. R. Williams.)

ing vessels like the *Camino*, as to having a hatch tender aboard, and in such situations as obtained at the time of the accident. Will you tell the jury whether or not such is the custom?

A. Well, where the winchman can see the load that he is handling and can see where the load is being landed, it is not the custom to use a hatch tender; but where he can't see it, where it is impossible for the winchman to see, a hatch tender is sometimes furnished, and it is not always a man—a hatch tender might be a man working slinging freight in the hold, or landing loads on the dock, might be a signal man himself. Now, for instance, if a load of freight was made up in the hold of the ship, where the winchman couldn't see it, there would be one man that made up the load would step out into the hatch in view of the winchman and give the signal himself, so he wouldn't be termed as a hatch tender himself.

Mr. Snow: Give the signal. What do you mean there?

A. Well, he gives the winchman the orders to go ahead on the offshore winch or the inshore winch, in order to get the load out in sight of the winchman before it is raised out of the hold.

Q. What was the position of the location of the *Camino* as she was berthed alongside Albers Dock No. 3? Was it possible for the winchman to attend to the duties of the hatch tender?

(Testimony of A. R. Williams.)

A. I think it must have been possible because—

Mr. Giltner: I object to what he thinks.

Court: He is testifying to actual conditions.

Mr. Giltner: Not what he thinks; what were actual facts.

Court: Answer the question. [84]

A. Prior to discharging this steel, they were discharging the general merchandise coming out of the hold, case goods, boxes, made up in rope slings; that is endless slings; and in landing a load of that kind onto a truck on the dock, it would be absolutely necessary for the winchman to be able to see where he was landing the load in order to let go at the proper time, and such being the case, I think it was—you could see the steel beams at the same time.

Mr. Giltner: I move to strike out what he thinks.

Court: The motion is overruled. It is a knowledge of facts he is testifying to. He is not giving an opinion about it.

Q. You have had a great deal of experience in this matter of overseeing the unloading of vessels?

A. Yes, sir.

Q. And you are familiar with the conditions on the Camino and other boats?

A. Yes, sir.

Q. And was that or was it not a safe place to work that obtained that evening?

(Testimony of A. R. Williams.)

Mr. Giltner: I object to that.

Court: That is objectionable. That is the question we are trying here in this case.

Mr. Guthrie: As I understand the testimony of the witnesses as called libellant, they have given their opinion, and if it is fair for one—

Court: Someone may have volunteered that opinion, but that is a question for the jury.

Q. In your opinion, or as you knew the conditions that evening, Mr. Williams, could the winch driver have properly handled that cargo? Could he see its delivery upon the dock?

Mr. Giltner: I object, as calling for the opinion of the witness.

Mr. Snow: That calls for a fact.

Court: State what the facts are, if you know.

[85]

A. If he couldn't have seen them, would certainly have been a complaint made.

Court: Could he see? Do you know whether he could see?

Mr. Giltner: I move to strike that out.

A. I don't know whether—I don't know, at that time, whether he could see.

Court: Then you don't know.

Q. What was the condition of the level of the Camino to the dock—compared to the dock level?

A. Well, the main deck of the Camino was above the dock, but I wouldn't attempt to say how far above the dock; was above the level of the dock.

(Testimony of A. R. Williams.)

Q. About how far away from those workmen would the winch driver have been stationed?

A. Well, the winch driver is stationed in the center of the ship; well, not exactly in the center of the ship.

Q. Well, about what beam does the Camino have?

Court: How far was that from its side?

Mr. Snow: How far from the edge of the boat?

A. Not over 18 feet.

Q. These girders are how long?

A. They were 18 feet long.

Q. And about how much of the dock was exposed before they were taken under the shed?

A. What?

Q. About how much of the dock would be exposed without a roof over from the ship's rail?

A. At the place where they were landing, it was about 10 feet—10 or 12 feet.

Q. How far back from the edge of the dock would these men ordinarily work—Mr. Barsch and his associates?

A. Well, it depends altogether on the nature of the load that was being landed. [86]

Q. At the time they were unloading this steel? How far out would the crane swing the load?

A. Clear to the door of the dock.

Q. Clear up to the shed?

A. Yes, sir.

(Testimony of A. R. Williams.)

Q. That would be practically the full ten feet?

A. Yes, sir.

Q. What is the beam of the Camino where these winches are situated? Aproximate, of course, is all I can ask.

A. I don't think she is forty feet.

Q. Was this hatch amidships where they were working?

A. Yes, sir.

Q. And the winches are stationed where? About the middle?

A. The exact middle, yes.

Q. Right in the exact middle. About how long a vessel is the Camino?

A. Do you know?

A. 306 feet.

Q. Along midships, how does her deck stand? Is her deck about the same level, or does it rise fore and aft and hollow out in the middle?

A. No, the Camino is pretty flat on top.

Q. She is fairly flat?

A. Yes, sir.

Q. Then her rail is about uniform?

A. Well, there is some sway in it. There is in all ships, but the Camino is fairly flat.

Q. Then your best recollection is that there was no serious complaint made to you by Mr. Barsch that night about his knee?

A. He complained of his knee, yes.

Q. But not as a serious injury?

(Testimony of A. R. Williams.)

A. Oh not enough to warrant me making out a report at that time.

Q. Well, did he treat it as a serious matter, or did he treat it lightly?

Mr. Giltner: I object to that. State what he said, but not the conclusion. [87]

Mr. Snow: That is the impression.

Court: What he said, and how he acted.

A. Mr. Barsch at that time complained of the knee, yes.

Q. Did he indicate whether or not he thought he would be back at work the next morning?

A. I don't remember.

Q. Let me hand you this to refresh your recollection, and tell me whether or not he did. Look this over. It appears over your signature, and refresh your recollection and see if you can answer that.

Mr. Giltner: Before you answer that, I would like to ask a question.

Mr. Guthrie: All right; what is the question?

Mr. Giltner: Can I see it?

Mr. Guthrie: Surely.

Mr. Giltner: I have no objection to this being read to the jury, what he said in here, if the Court please, but I want this read, what he said.

Mr. Guthrie: I am not offering it in evidence.

Court: He is examining it to refresh his memory.

Mr. Giltner: You made this report, did you?

A. Yes, sir.

(Testimony of A. R. Williams.)

Mr. Giltner: This is your signature?

A. Yes.

Q. Now, having refreshed your memory, Mr. Williams, what do you say is the fact as to whether or not any statement was made of his intentions to return to the work in the morning?

A. Well, Mr. Barsch wanted to go home at the time, but I asked him to go up to the mate's room and have his finger dressed, and he complained of his knee at that time, and I told him myself not to come back the next day if he didn't feel able to do so. It has always been my custom, if a man is hurt in the work, if he is able to work at all, to give him a chance, and that is the reason I told him to come back if he was able to come back. [88]

Q. And what did he say as to his willingness to come back in the morning?

A. Oh, he said at that time that he thought he would be back in the morning.

Q. And generally he treated—how did he treat the injury that evening? As serious, or inconsequential?

A. Why, he told me that it pained him a good deal, but there was nothing said at that time about its being a serious thing.

CROSS-EXAMINATION.

Questions by Mr. Giltner:

Did you not state to Mr. Kennedy, to whom you wrote this letter, in this letter that Mr. Barsch

(Testimony of A. R. Williams.)

claimed his knee was badly hurt?

A. I did.

Q. Then he did claim that his knee was badly hurt?

A. He did.

Q. Now, when you were keeping time there, at the time of this accident, you say you were in the employ of Swayne & Hoyt, and also the American-Hawaiian?

A. No, I didn't say that. I said when I was working for the American-Hawaiian I was working as receiving clerk, and when I was keeping time, I was working for Swayne & Hoyt.

Q. Well, at the time you were keeping time, for these men, you were working for Swayne & Hoyt then, were you not?

A. Yes, sir.

Q. Swayne & Hoyt paid you?

A. No, I was paid—

Q. You were paid through Mr. Kennedy?

A. I was paid through Mr. Kennedy. I was paid by his payrolls as the longshoremen.

Q. He was the agent of Swayne & Hoyt, wasn't he?

A. He was the agent.

Q. Then you understood you were working for Swayne & Hoyt? You were [89] getting your pay from Swayne & Hoyt, weren't you?

A. I wasn't getting my pay directly from Swayne & Hoyt; was getting it from Mr. Kennedy.

(Testimony of A. R. Williams.)

Q. Was Swayne & Hoyt's money paying you? That is the point?

A. Well, I don't know, Mr. Giltner, whose money it was.

Q. But you were keeping the time of these men for Swayne & Hoyt. You were doing that, weren't you?

A. I can't say as to that either. My instructions were to keep time for the men, and the payrolls were made out on these payroll blanks.

Q. Were made on Swayne & Hoyt payroll blanks, were they not?

A. Yes, they were.

Q. And didn't you understand you were making these payrolls for Swayne & Hoyt?

A. Well, I don't believe there was anything said about that at all.

Mr. Snow: Well, I—

Mr. Giltner: This is cross-examination.

Q. You state that you can't say now whether the engineer or the winchman could see these men that were working on the dock at the time of this accident. You can't say whether he could or couldn't—is that it?

A. No, I cannot.

Q. Do you mean to tell this jury that where the winch tender is not able to see the men that are working in the hold of the vessel, or on the dock, that it is not the custom to have a signal man or a hatch tender, to signal as to when to go

(Testimony of A. R. Williams.)

ahead, and when to come back? Do you mean to state that?

A. Well, it depends on circumstances.

Q. Well, I mean when he can't see them when he—

A. Sometimes a regular man is appointed for that duty, and sometimes not.

Q. What is that?

A. Sometimes a regular man is appointed for that, and sometimes not.

Q. Isn't it more often that he is appointed for that duty?

A. It hasn't been the case with us, no. [90]

Q. Then you have not been following that custom?

A. Usually one of the mates acts as signal man.

Q. And the Camino didn't have a signal man that evening, did it, when he was hurt?

Mr. Snow: You say we did in your own complaint.

Mr. Giltner: I beg leave to differ with you on that. We will argue that when the time comes.

Court: Go ahead.

A. Well, the mate of the ship was in—

Q. Well, answer my question yes or no?

A. Well, I don't know.

Q. Well, you know a good many other things that happened there, but you don't know that there was a signal man there?

A. I don't know at the time he was hurt.

(Testimony of A. R. Williams.)

Q. Well, you kept the time of the men after that, didn't you?

A. I did.

Q. Were you on the dock at any time where these men were working?

A. I was on the dock and on the ship.

Q. Were you anywhere around the winches or hatches?

A. Why, very often I had to go down in the hold and hatches.

Q. Well, if there had been a signal man there, you would have seen him, wouldn't you?

A. I probably would have seen him, yes, the same as I would have seen the winchman.

Q. And you didn't see any signal man there, did you?

A. No, I did not; no.

Q. Well, you could have answered that in the first place.

A. You didn't ask me that, Mr. Giltner.

Mr. Giltner: That is all.

Court: You said you kept the time of the men. What did you mean by that? What men?

A. The longshoremen.

By the Court: Not the ship crew?

A. No. [91]

E. P. Dosch, a witness called in behalf of the defendant, having been duly sworn, testified substantially as follows:

DIRECT EXAMINATION BY MR. GUTHRIE.

Q. Mr. Dosch, state what work you were engaged in on the 31st day of March, 1913.

A. Chief wharf clerk for the American-Hawaiian Steamship Company.

Q. You were wharf man?

A. Yes.

Q. And you were working on what dock?

A. Albers Dock No. 3.

Q. And what steamship were you directing the unloading of about the wharf, what cargo?

A. As near as I know it was the steamer Camino.

Q. And of what did your duties consist?

A. Seeing that the freight was carefully distributed through the warehouse where it was consignee marked

Q. Are you acquainted with Mr. E. A. Shneider, Secretary of the Longshoremen's Union?

A. Yes, sir.

Q. State to the jury what is the method by which you employ men, or by which you send orders to the secretary for men to come down to the dock.

By Mr. Giltner: I think he should ask what he did at this time, at the employment of Barsch, instead of going over this whole thing.

Q. Very well, then, I will try to state it definitely. Can you recollect the procedure you went through in securing men to come down to the

(Testimony of E. P. Dosch.)

wharf to work on the steamship Camino about the 31st day of March, 1913? [92]

A. Well, we always used just one system, that is if we want longshoremen; when ordered to get longshoremen, or need them myself, I usually [93] telephone or call at the hall, and get hold of the business agent of the Union, and tell him I want so many men to work, such and such a boat, at such and such an hour, whatever it may be.

Q. In any of these interviews which you have had, either personally or by telephone, with the business agent, did you represent to the business agent that you wished men to work for Swayne & Hoyt?

A. Not necessarily, no sir. At no time; never did.

Mr. Giltner: What was that answer? Not necessarily?

A. No, sir; never did.

Q. Did you ever employ men for Swayne & Hoyt?

A. No, sir, not that I know of.

Q. What is your best recollection of the 31st day of March, 1913? Did you employ men for Swayne & Hoyt that day?

A. Well, I couldn't say, because I never do use any name at all. Never even used American-Hawaiian Steamship Company when I order men; merely call for the men, say I want 30 men at seven o'clock at such and such a dock, for

(Testimony of E. P. Dosch.)

such and such a steamer; whether the Camino, the Navajo, or *or* the Paraiso, whatever ship wants men.

Q. Your work is general wharf man around there?

A. I am considered chief wharf man down there.

Q. As such chief wharf man, Mr. Dosch, would it have been any of your duty to have instructed the officers or members of the crew, as to what system of signals they should use in unloading the cargo from the ship's hold?

A. No, sir.

Q. Who had charge of the direction of unloading the cargo from the ship's hold?

A. The officers of the ship.

Q. Would it have been any part of your duty to have indicated to the captain that he should put a hatch tender or signal man on the steamer Camino?

A. No, sir. [94]

Q. If you had indicated to the captain that he should put a hatch tender or signal man on the Camino, would your orders have been obeyed?

A. I couldn't give orders.

Q. Why not?

A. Because he was in charge of the ship; I had nothing to do with it.

Q. Were you familiar with the methods by which the *steam* beams were being unloaded at

(Testimony of E. P. Dosch.)

the time Mr. Barsch was hurt—the method by which they were being unloaded?

A. Only one way we usually handle them—with a bridle.

Q. Do you recall the situation of the winchman on the vessel?

A. What is that?

Q. Do you remember the winchman being on the vessel—on the steamer Camino?

A. Pretty hard thing. They change every trip or so.

Q. I don't mean, do you remember the particular man, but do you remember the system under which they worked?

A. Well, they only worked one way. Yes, sir, of course.

Q. What sort of winch did he operate?

A. Double set of winches.

Q. He operated double winches?

A. Yes.

Q. Now, what was the opportunity for the winch driver on the deck of the vessel to see the men at work who were receiving the cargo, as Mr. Barsch and his associates were?

Mr. Giltner: At what time?

Mr. Guthrie: That day, the 31st day of March.

Mr. Giltner: At the time of the accident. I object to his testifying—

Mr. Guthrie: Now, let him tell, the best he knows.

Mr. Giltner: I am objecting, and I make my

(Testimony of E. P. Dosch.)

objection to the Judge. I think it should be at the time of the accident.

Court: The time of the accident. [95]

Mr. Guthrie: Let him tell what they were doing.

Mr. Giltner: At the time of the accident.

Mr. Guthrie: He can't tell particular minutes.

Court: Go ahead. Ask if he saw the unloading of this cargo.

Q. You saw them unloading this cargo of steel beams, didn't you?

A. Not particularly at that time, I couldn't say. I saw them off and on. I am all over, and don't see every sling.

Q. From the position of the winchman of the vessel, could he have secured a view of the men working on the dock?

Court: If he knows he can testify.

Mr. Giltner: At the time of the accident.

Q. Go ahead. Could the winchman have seen the men working on the dock?

A. Yes.

Q. Was there anything to obstruct their view?

A. Nothing.

Q. What was the custom of giving signals to the winchman? Who gave them?

A. Usually the men that were landing the loads gave the signal, when he wants him to go back or pick it up.

Q. And the winchman receives his signal

(Testimony of E. P. Dosch.)

from men like Mr. Barsch, men doing that work like Mr. Barsch does?

A. Yes, sir.

Q. What is the custom usually in this port, with respect to unloading steam schooners of the type of the steamer Camino, as to whether or not a hatch tender is placed on the rail of the vessel?

A. Never use one unless the winchman can't see in the hold.

Q. Are you familiar with the scale of wage which longshoremen receive on the water front in the Port of Portland?

A. Yes, sir.

Q. Do you know what scale of pay men get who work wheat in this port?

A. Well, we always, if they work for a schooner—they get fifty-five cents for straight time, and eighty-two and a half cents an hour over [96] time, holidays and Sundays. If working under stevedores, get fifty-five cents straight, and get a dollar an hour straight time and over time. Every foreman working gang usually gets sixty cents straight time, and \$1.10 over time, and I think—I won't be sure of the over time.

Q. State whether or not it was the custom for longshoremen working in loading vessels here taking cargoes of wheat, to work on shifts over time, as well as during the regular shift of straight time.

A. A man that—

Mr. Giltner: I object to that as incompetent,

(Testimony of E. P. Dosch.)

immaterial and irrelevant, and has nothing to do with the issues in this case as to whether a man works over time or under time. What relation has it to this case?

Mr. Guthrie: If your Honor please, Mr. Barsch himself has testified to earning the sums of money which he has receipted for, and we wish to show he is able to do that, and is accustomed to it.

Mr. Giltner: You were asking about custom.

Mr. Guthrie: Damages is one of the questions here.

Mr. Giltner: I don't care. Go on and testify.

Q. Is it the custom for stevedores and longshoremen to work over time, as well as during their straight shift?

A. Sure.

Q. Would it be possible for a man working straight time and over time to earn as much as \$9.60 in one day and night?

A. Yes, sir; depends on the length of time, of course, he puts in.

Q. Would it be possible for a man to work and earn as much as \$10.50 in one day?

Mr. Giltner: This is all asking for a conclusion of the witness, opinion of the witness. Besides that, this doesn't prove the custom of men working over time. It is not a question of custom anyway. I sincerely object to these questions.

Court: I think it should be confined to an in-

(Testimony of E. P. Dosch.)

quiry to what is [97] known as straight time—how many hours straight time.

Mr. Guthrie: These are the particular three days this man has testified impossible to earn the sums.

Q. Could a man working straight time, with some over time, earn as much as \$10.50 in one day?

A. If he put in the length of time, yes, sir.

Q. Could he earn as much as \$17.45 if he worked all night?

A. That is if he worked straight over time—over time—whether he could make it? That is, working for the stevedores or under their scale.

Q. With respect to placing hatch tenders on the vessels, Mr. Dosch, is it or is it not the custom to place hatch tenders on the coasters that come in and out of this port?

A. I have never seen one. Not on what they call a coastwise vessel.

Q. For how many years have you worked in this business?

A. Over 20 years.

Mr. Snow: What was the Camino?

Q. Was the Camino a coast vessel, or one going foreign?

A. Considered a coastwise vessel.

CROSS-EXAMINATION.

Questions by Mr. Giltner:

What time did you leave the dock the evening before the accident?

(Testimony of E. P. Dosch.)

A. Did I leave the dock?

Q. Yes.

A. I don't know.

Q. Do you know what time this accident happened?

A. No, sir.

Q. Do you know whether it was in the morning or evening?

A. No, sir.

Q. Don't you know what time you went to dinner that day?

A. On board the ship when ship in port, usually.

Q. Were you present when the accident happened? [98]

A. I didn't see it.

Q. Did you see the accident?

A. No, sir.

Q. Where were you when the accident happened?

A. I don't know.

Q. How long had you been gone from the dock when the accident happened?

A. I don't know.

Mr. Snow: He hasn't said he was gone from the dock.

Mr. Giltner: I am asking that question—he wasn't there.

Q. How long had you been gone from the dock, if you were gone from the dock, when the accident happened?

(Testimony of E. P. Dosch.)

A. I don't know. I don't know when it happened.

Q. Were you at the dock when the accident happened?

A. I don't know.

Q. When did you first hear of the accident?

A. I heard of it the next morning.

Q. If the accident had happened—if you had been at the dock when the accident happened, the probability is you would have been there to see about it, would you not?

A. Not necessarily. Not unless it was a serious accident.

Q. Now, this accident happened at half-past seven in the evening. Can't you tell the jury where you were at that time. Where were you? Do you know?

A. No, sir.

Q. Can you tell how high above the wharf this boat was at the time the accident happened?

A. No, sir.

Q. Could you tell what the winch tender was doing at the time the accident happened?

A. No, sir, any more than he was working on his winch, I suppose.

Q. Could you tell where these men were working on the dock at the time the accident happened? [99]

A. No, sir.

Q. You said, did you not, that the winch tender could see these men working on the dock?

(Testimony of E. P. Dosch.)

There was nothing to prevent him seeing them then?

A. Nothing that I know of, no, sir.

Q. You don't know whether there was or not, do you?

A. Nothing on any of these boats that you can't see the dock?

Q. Yes, but suppose the men were working up close to the ship, or working on the inside of the dock. Can the winch tender see them then?

A. Not inside of the dock, no, sir. If working on the fact of the dock, he can.

Q. In whose employ are you?

A. American-Hawaiian Steamship Company.

Q. Whom do you take your orders from?

A. Mr. Kennedy.

Q. Did you ever see any of these coastwise steamers loading at any other dock?

A. Yes, sir.

Q. At Inman-Poulsen dock?

A. Beg pardon?

Q. Have you ever seen any of them load at Inman-Poulsen dock?

A. No, sir.

Q. Do you mean to tell this jury that where the engineer cannot see the men who are working, that they don't employ signal men to signal to the engineer, and men working in the hold, or in a position where they can't see him?

A. I didn't say that, sir.

Q. Isn't it a fact, where the engineer cannot

(Testimony of E. P. Dosch.)

see the men working that it is the custom in this port to get a signal man, to have a signal man there who would signal between the man who operates the motive power, and the men in the hold, or in a position where the winchman can't see them? Isn't that a fact?

A. Yes, sir, often done. [100]

REDIRECT EXAMINATION.

Questions by Mr. Guthrie:

As a matter of fact, Mr. Dosch, when you are engaged in overseeing the depositing of the cargo about the wharf, do you or do you not stay about the wharf all the time the steamer is unloading?

A. Always there; usually the last man to leave the dock.

Q. So that you were somewhere about the dock where the vessel was, all the time?

A. Yes, sir.

Q. The accident that happened to Mr. Barsch, was it or was it not reported to you that night?

A. I heard of it the next morning; told to me, but not very serious.

Mr. Giltner: I object to his stating what somebody told him.

Court: No, that wouldn't be competent.

Mr. Giltner: This man has been a witness before in a number of cases.

Q. So you heard nothing of the accident that night?

A. No, sir.

(Testimony of E. P. Dosch.)

Q. Now, Mr. Giltner suggested to you that hatch tenders were sometimes employed on vessels in the harbor of the Port of Portland, where it was impossible for the winch driver to see the men on the dock; did you have reference to coastwise vessels when you said sometimes they were?

A. Well, that depends on the conditions of loading and unloading.

Q. I say, do you mean that coastwise vessels employ hatch tenders?

A. I have never seen any personally.

Q. Do foreign-going vessels employ them sometimes?

A. They do, yes, sir.

Mr. Giltner: Now, if the Court please, I wish to move to strike out the testimony of this witness in regard to the custom of coastwise vessels. He has testified that he has never seen them, and he has not testified to custom, and he has not testified he knew, and I therefore move to strike out. He says he has never seen them, but he hasn't [101] testified that he knew what the custom was.

The Court: I understood him to say so on direct examination, he did know what the custom was.

Mr. Giltner: I beg pardon. He says he never saw them.

Mr. Snow: That is the way of proving custom.

Mr. Giltner: You must know what the custom is, not at one place, but at different places along

(Testimony of E. P. Dosch.)

the harbor here, as I understand the rules in regard to custom. Custom isn't one place.

Mr. Snow: Custom has to be uniform too.

Q. One question which perhaps I should have asked on direct examination, if your Honor please, I would like to ask. It is in evidence, Mr. Dosch, that this cargo was being taken out from the midships hatch. State whether or not the midships hatch on the steamer Camino is on the higher or lower parts of that vessel.

A. Midships hatch was called No. 2 hatch, was just forward of the pilot house.

Q. That would be higher or lower than the other parts of the vessel?

A. It would be lower than No. 1 and almost on a level with No. 3, very little difference.

Q. What is the deck plan of the steamer Camino? Is she scooped out as some schooners are, or not?

A. One deck full length.

Q. Practically one flush deck?

A. Yes sir, she has no walls. [102]

On the part of the defendant there was taken depositions of John G. Hoyt, A. A. Moran and R. H. Swayne, said depositions being taken upon interrogatories and cross-interrogatories furnished by the defendant and plaintiff respectively. The identical interrogatories and cross-interrogatories were propounded to each of the three witnesses.

(Depositions of John G. Hoyt et al.)

Mr. Hoyt testified on direct interrogatories that he resided in Oakland, California; that his occupation was that of a ship broker. That on or about the 31st of March, 1913, he was Vice-President of the defendant corporation, and familiar with the relationship of the defendant toward the steamship "Camino," and that such relationship was that of managing agent.

Mr. A. A. Moran testified on direct interrogatories that he was manager of the shipping department of the defendant, residing in San Francisco. On or about the 31st day of March, 1913, his official relation was the manager of the shipping department, and that at that time the defendant sustained the relation of managing agent for the Western Steam Navigation Company, owners of the "Camino." That Kennedy was not in the employ of Swayne & Hoyt on and before March 31, 1913.

Mr. R. H. Swayne on direct interrogatories testified that he was engaged in the shipping business, residing in Alameda, California. That on or about the 31st day of March, 1913, he was President of the defendant, and that at that time the defendant sustained the relationship of agent for the Western Steam Navigation Company, owners of the "Camino."

The foregoing testimony was adduced in reply to the first five direct interrogatories propounded to the witnesses. The sixth interrogatory was as follows: [Bill of Exceptions x1] [103]

(Depositions of John G. Hoyt et al.)

Let the witness state whether or not on or about the 31st day of March, 1913, the steamship "Camino," its tackle, apparel, furniture and machinery, were in the possession of or controlled by defendant Swayne & Hoyt, Inc., for the purpose of unloading structural iron or steel beams in the harbor of the Port of Portland, State of Oregon, and state whether or not on or about the 31st day of March, 1913, defendant employed plaintiff, Gustave Barsch, for the purpose of assisting in unloading structural iron or steel beams from the steamship "Camino" on the dock in the Port of Portland aforesaid.

To this interrogatory Mr. Hoyt testified that he did not know as to the first part of the interrogatory whether the "Camino" was in the port on March 31st, 1913, or not, but as to the latter portion of interrogatory he could testify "no."

Mr. Moran testified that on March 31st the "Camino" was not directly under the control of the defendant but was being handled by the agent of Western Steam Navigation Company at Portland, and the master of the vessel. As to the latter portion of interrrgoatory he testified that the defendant had no direct connection with the appointment of the plaintiff.

Mr. Swayne testified that as to the first portion of interrogatory, assuming the "Camino" to have been in port at that time, the defendant was not in control for the purpose stated in the interrogatory, and as to the latter portion of the inter-

(Depositions of John G. Hoyt et al.)

rogatory he stated that the defendant did not employ the plaintiff, and could not have employed him if he were to assume that plaintiff was employed, respecting which the witness had no personal knowledge.

The seventh interrogatory propounded to these witnesses inquired whether or not the defendant was engaged in the supervision of unloading the "Camino" on or about March 31st, 1913, or in any manner attended to the employment of stevedores or longshoremen, hatch tender, winchmen or [Bill of Exceptions x2] [104] signal men for the purpose of facilitating the unloading of the "Camino." To that inquiry Mr. Hoyt testified that the defendant was not engaged on that date in unloading the steamship "Camino." Mr. Moran testified that the defendant had no direct supervision at the time. Mr. Swayne testified that, assuming the "Camino" to have been in process of unloading at the time, the defendant did not and could not have anything to do with that operation.

The eighth interrogatory was propounded as follows:

"Let the witness state what person, firm or corporation was the owner or engaged in the work of unloading the steamship "Camino" in the harbor of Portland on or about the 31st day of March, 1913."

To which Mr. Hoyt replied:

"The Western Steam Navigation Company

(Depositions of John G. Hoyt et al.)

was the owner and was engaged in unloading the steamship through its agent.”

Mr. Moran replied:

“The Western Steam Navigation Company through its agent and the master of the vessel.”

Mr. Swayne replied:

“The owners, Western Steam Navigation Company through its agent.”

The interrogatory continued:

“And what person, firm or corporaotion assumed responsibility for the work of unloading the said steamship “Camino,” * * *

To which Mr. Hoyt replied:

“The Western Steam Navigation Company was the owner of the vessel and was responsible through its agent, C. D. Kennedy.”

Mr. Moran replied:

“The Western Steam Navigation Company.”

Mr. Swayne replied:

“The Western Steam Navigation Company assumed the responsibility.” [Bill of Exceptions x3] [105]

The interrogatory continued:

And what person, firm or corporation employed the plaintiff in the work of assisting in the the unloading of structural iron or steel beams,

To which Mr. Hoyt replied:

I don't know; I presume it was C. D. Kennedy; I don't know.

Mr. Moran replied:

The Western Steam Navigation Company.

(Depositions of John G. Hoyt et al.)

Mr. Swayne replied:

Assuming that the plaintiff was employed he was employed by the Western Steam Navigation Company through its agent at Portland.

The interrogatory continued:

And let the witness state what person, firm or corporation employed hatch tenders, signal men, winch men and engineers in the operation of the unloading apparatus of the steamship "Camino" on or about the 31st day of March, 1913, and during the times complained of by plaintiff, at which time steamship "Camino" was berthed in the Willamette River, Port of Portland, State of Oregon.

To which Mr. Hoyt replied:

If she was there at that time I presume C. D. Kennedy was acting as agent of the Western Steam Navigation Company; I cannot say of my own knowledge.

Mr. Moran replied:

The Western Steam Navigation Company through the appointment by the master. At the present time I am not positive she was there at that date; it would be necessary for me to look up the facts; I presume she was.

Mr. Swayne replied:

Whatever employes described were employed by the Western Steam Navigation Company through its agent.

Cross-interrogatories propounded to these witnesses adduced that Mr. Hoyt was Vice-Presi-

(Depositions of John G. Hoyt et al.)

dent of the defendant about the 31st of March, 1913. That C. D. Kennedy was not in the employ of the defendant on or about that time. That the witness did not know personally [Bill of Exceptions x4] [106] whether Kennedy forwarded to the defendant a statement of the amounts of money paid out on account of unloading structural iron beams from the "Camino" at the time in question, nor did the witness know personally whether the defendant repaid Kennedy on account of money so paid out on behalf of the defendant company.

The witness answered negatively to the fifth cross-interrogatory as to whether or not it was a fact that Kennedy was acting as agent for the defendant in Portland, Oregon, in the employment of men for the purpose of unloading the "Camino" at the time in question.

Responding to the sixth cross-interrogatory the witness testified that defendant had no contract in writing with the owners of the steamship "Camino," and in response to the seventh the witness stated that he could not attach a copy of such contract since he had none.

The eighth cross-interrogatory was as follows:

"Is it not a fact that on and prior to March, 31, 1913, the defendant, Swayne & Hoyt, Inc., was the managing agent of the steamship "Camino," with power of directing the movements and operations of the officers and crew of said ship and of said ship?"

(Depositions of John G. Hoyt et al.)

To which the witness answered "Yes."

The identical cross-interrogatories propounded to Mr. Moran disclosed that Mr. Moran was manager of the shipping department of the defendant. That C. D. Kennedy was not employed by the defendant on and before March 31st, 1913. That Kennedy did send to the defendant a statement of the receipts and disbursements as the agent for the owners of the steamer, but not a statement for the account of Swayne & Hoyt. That the defendant made an adjustment on account of Western Steam Navigation Company with Kennedy, and that such was made as the managing agent for the company. [Bill of Exceptions x5] [107]

Responding to the fifth cross-interrogatory the witness stated that Kennedy was not acting as the agent for the defendant in the employment of men for the purpose of unloading the cargo in question.

Responding to the sixth and seventh cross-interrogatories the witness stated that defendant had no written contract with the owners of the steamship "Camino"—that there was no written contract.

In responding to the cross-interrogatory eight, identical with that propounded to the witness Hoyt, the witness testified: "Yes, they were."

Cross-interrogatories propounded to Mr. Swayne adduced the following:

That the witness was President of the defend-

(Depositions of John G. Hoyt et al.)

ant. That C. D. Kennedy was not in the employ of the defendant on and before March 31st, 1913, and before that time Kennedy did forward to the defendant a full statement of the transactions which were forwarded to Swayne & Hoyt as agent for the owners, and that as agent for the owners the defendant settled accounts with Kennedy from time to time, and that he believed the particular account for unloading steel beams from the "Camino" on or about March 31st, 1913, was settled in that way.

Responding to the fifth cross-interrogatory the witness testified that Kennedy was not acting as agent for the defendant in Portland, Oregon, at the time in question.

Responding to the sixth and seventh cross-interrogatories the witness stated no written contract existed between the defendant and the owners of the [108] "Camino," and that he could not attach a copy to his deposition.

Responding to cross-interrogatory eight, identical with that propounded to the witness Hoyt, Mr. Swayne answered:

"As agent they directed the master and other officers from time to time."

Other evidence disclosed that shipments of wheat from the Port of Portland began in the early Fall of each year and were practically completed by the following Spring, or early Summer. It was shown that plaintiff worked during a number of weeks in the Fall and Winter of 1913, and

(Depositions of John G. Hoyt et al.)

in 1914 for Brown & McCabe and The McCabe Company, Inc., who were stevedores at the Port of Portland. Payrolls were introduced bearing plaintiff's signature, aggregating \$350.00 or more. On several days plaintiff had earned large sums of money and on the 27th of December, 1913, earned \$17.45.

Physicians and others testified as to the nature, character, and seriousness of the injury received by the plaintiff; the evidence on that subject was conflicting. Radiograph plates taken of plaintiff's right and left knee were introduced in evidence as Defendant's Exhibits "D" and "E" respectively.

All of the evidence having been received the cause was argued to the jury by the attorneys for the respective parties and in the course of the presentation of law to the court the defendant requested the court to give the following instruction to the jury:

"The jury is instructed to find for defendant."

But the giving of the foregoing instruction the court refused, to which refusal the defendant excepted on the ground that the instruction should be given and under the evidence in [Bill of Exceptions x7] [109] the cause the defendant was not liable, the exception being then and there allowed by the court.

Thereupon likewise the defendant among

(Request instructions and exception.)

other instructions requested the following instruction to be given to the jury: [110]

“It is charged in the plaintiff’s complaint that the accident which brought about the alleged injuries to the plaintiff arose by the action of the foreman of the defendant, who it is said carelessly and negligently, and in his haste to unload the ship, gave the signal to the engineer to go ahead before this foreman was notified by the plaintiff, or his co-workmen who were handling the load on the truck, to do so, and that the engineer operating the winch on the vessel, without notice to the plaintiff, obeyed this signal of the foreman, in consequence of which plaintiff was injured. I charge the jury that the foreman in question, and the engineer operating the winch on the vessel, were fellow servants of the plaintiff, and for any negligence of the foreman in prematurely giving, if he did prematurely give, the signal to the winch man, the plaintiff cannot recover in this action.”

But to give the foregoing instruction the court then and there refused, to which refusal the defendant then and there excepted in open court, the exception being allowed, the ground of the exception being that the Employers Liability Law of the State of Oregon had no application to the loading or unloading of vessels coming in and out of the City of Portland and engaged in interstate commerce and that the foreman in question,

(Request instructions and exception.)

with the winchman, were under the law fellow servants of the plaintiff.

Thereupon also the defendant requested that the following instruction be given to the jury:

“The complaint charges among other things that by means of the manner in which the work of the unloading of the steamer “Camino” was conducted, and the sudden and unexpected raising of the beam which the plaintiff with other workmen was engaged in landing from the vessel, that plaintiff was struck on the knee and was permanently injured and bruised in the knee joint and in the tendons and ligaments thereof and in the bone of the knee. I charge the jury that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence the permanent injuries claimed, and unless the jury can say by a fair preponderance of all of the evidence in the case that there is a permanent injury, then the jury should conclude that the plaintiff was not permanently injured, and if you find for the plaintiff no damages should be returned for any permanent injury.”

But to give the foregoing instruction, as requested, the court then and there refused, giving to the jury an [6 Bill of Exceptions] [111] instruction on the question, but in modified form, and to the refusal of the court to so instruct, as requested, the defendant then and there in open court excepted on the ground that the instruction correctly stated the law and should have been

(Request instructions and exception.)

given by the court and should not have been modified as the court modified the instruction, the exception being then and there by the court allowed.

The foregoing instructions requested and the exceptions taken were requested and taken and the exceptions allowed before the jury retired to consider upon their verdict.

The court thereupon instructed the jury as follows:

“This action is brought by Mr. Barsch against Swayne & Hoyt to recover damages for a personal injury which he alleges to have suffered on the 31st day of March, 1913, while engaged in assisting in discharging a cargo from the Steamer “Camino,” which injury he charges was due to the negligence of the defendant, first, in the foreman giving an improper signal to the winch engineer. Second, in failing and neglecting to establish a system of signals or means of communication between the workmen and the engineer. And third in failing to station what is referred to in the testimony as a hatch tender to give such signals. The defendant, Swain & Hoyt deny responsibility entirely. They deny, in the first place that they were in charge of the work, or that they are responsible in any way for the accident occurring to him.

Now, before it becomes necessary for you to consider the question of negligence it will be im-

(Instructions given to Jury.)

portant for you to determine whether or not Swain & Hoyt are liable for this accident, if anybody is liable for it. It is not claimed, nor is there any evidence tending to show that Swain & Hoyt owned the steamer "Camino." There is no evidence nor is it claimed that Swain & Hoyt were the charterers of the vessel. The only testimony in reference to that matter is that they are what is referred to and denominated as managing agents, that is that they were acting for the owners. Now a managing agent is one who is entrusted with the general supervision and active direction of another one's business, and in shipping parlance it means one who represents the owner or owners of a vessel, in directing the shipment of cargo, the movement of the vessel and the general operation of the vessel or vessels which may belong to these owners. The managing agent in such case operates and directs the movement of the cargo and vessels on account of the owners, while the owners on the other hand operate the vessel insofar as the navigation is concerned through the officers and crew of the vessel. Now, the fact, if it is a fact, that Swain & Hoyt were the managing agents of this vessel would not of itself make them liable for the [7 Bill of Exceptions] [112] injury that occurred to some one working on the vessel, nor would the fact that as such managing agents they employed the plaintiff or employed the other officers or employes of the vessel make them personally liable

(Instructions given to Jury.)

for the negligence of these officers or agents. Let me illustrate: If Mr. Hall was the managing agent of a mill company in his town, and as such managing agent should employ the men at work in the mill, they would not be working for him because of that fact, but they would be working for the mill company for whom he was the agent, and for whom he acted, and if in engaging the men he should neglect and fail to disclose to them the principal for whom he was acting, he would probably become liable personally for their wages, but they would nevertheless be the employes of the mill company for whom he himself was agent and for whom he was acting, *and for whom he was acting*, and he would not be responsible for an injury that occurred in the mill through the negligence of the owners and the parties who were operating it. He could only be held liable for negligence when he himself, upon his own account, was in charge of the mill, and did some negligent thing that resulted in the accident or injury to another employe. So, in this case, if Swain & Hoyt were the mere managing agents of this boat, and acting as such for their principal employed the men that worked on the boat, and these men after they had been so employed and while they were at work on the boat were careless and negligent and through their carelessness and negligence some one was injured, the owners of the boat would be responsible under some circumstances under the

(Instructions given to Jury.)

maritime law, but Messrs. Swain & Hoyt would not be simply because they were the managing agents. Before they could be held responsible for an accident occurring on the boat, it must appear that they themselves, on their own account, were in charge of the boat at that time, operating it and directing the men and the course of procedure, and that through some negligent act of theirs the injury occurred, and unless that appears in this case, then there is no liability against Swain & Hoyt, whatever liability there may be against other parties.

Now, there has been some testimony in this case indicating that Swain & Hoyt may have had some freight on this vessel. That would not make them liable for an injury occurring on the vessel any more than it would make any other consignee, or any other man that had freight. It is a circumstance in the testimony tending to show the relation that existed between these parties. Again there has been some testimony about an interview between Mr. Barch and Mr. Moran, and Swain & Hoyt in San Francisco, and an examination that was made of him by a physician, at the request or direction of Swain & Hoyt, and that Mr. Kennedy, the local man here in Portland, whom plaintiff claims to be the agent of Swain & Hoyt, reported this accident to Swain & Hoyt. Now, that may be consistent with liability on the part of Swain & Hoyt but not inconsistent with non-liability, because if they were the man-

(Instructions given to Jury.)

aging agents representing the owners, the natural person to whom any one having a claim against the owners of the vessel would go would be to the managing agent, and that is Swain & Hoyt; the natural person to whom Kennedy would make his report would be the managing [8 Bill of Ex-ceptions] [113] agent, the man who represented the vessel, and so that fact alone would not justify a recovery in this case. They are circumstances for you to consider in determining whether or not Swain & Hoyt were in actual control of this vessel, operating it, and responsible for the conduct of the men engaged therein, but it would not be sufficient to justify a recovery in this case.

Now, the plaintiff alleges negligence on the part of Swain and Hoyt on account of defendant's methods of handling and unloading the cargo of the Camino. You are instructed, as I have said, that if they were the mere managing agents acting for the owners and not for themselves, there is no legal liability against them in this case, unless you should find from the testimony that they were, on their own account, in charge of this vessel at the time of this accident or controlling the movement of these men for themselves and not for their principals, and upon this question the burden of proof is upon the plaintiff to prove that defendant, Swain & Hoyt, was not only the employer of the plaintiff, but that they were in charge and in control of the

(Instructions given to Jury.)

method of handling the cargo, and unless he has satisfied you by a preponderance of the proof upon this question, then you have no further concern with this litigation. It would simply be a case where the liability, if there is any liability, is on behalf of some one else other than the defendant in this case.

If, however, you should find that Swain & Hoyt were in control of this vessel at the time of this accident, on their own account, and that by reason of that fact they are liable for this injury, if there was an injury, and if anybody was injured, then it will be necessary for you to consider the other phase of this case.

The law is that an employer is required to exercise reasonable care to provide his employes with a reasonably safe place in which to work, and the statute of this state provides that all machinery, other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same, or for the safety of the general public, be provided with a system of communication by means of signals so that at all times there may be prompt and efficient communication between employes or other persons and the operator of the motive power.

So that if you believe from the testimony that at the time of the plaintiff's accident, or the injury received by him, that it was necessary for the safety of the persons employed in or about these boats that a system of communication by

(Instructions given to Jury.)

means of signals should have been provided so that the winchman could have been advised of the movements of the men who were engaged in discharging and storing the cargo, and that the parties in charge of the boat and who are responsible for this injury failed and neglected to provide such a signal, and that failure was the proximate cause of the plaintiff's injury, then in that event it would be negligence within the meaning of this statute, and would entitle the plaintiff to recover. But, as I have said, before you can find the defendant, Swain & Hoyt, liable on this account, you must find by a preponderance of the proof that it was in charge of the unloading operations of the steamer; that it had authority to establish a system of communication and to place a hatch tender on the vessel, notwithstanding the directions of the master, first officer or other officers of the steamer. [9 Bill of Exceptions] [114]

Now, there is no evidence in this case as I recall it, that the master or officers of this vessel were employed by Swain & Hoyt on their own account. There is some testimony indicating that they were employed by this firm, but unless there is testimony tending to show that they were employed on account of Swain & Hoyt, the inference would be, since they were agents for the owners, that they were employing them for the owners of the vessel, and that they became the

(Instructions given to Jury.)

agents and employes of the owners of the vessel and not Swain & Hoyt.

Now, there is some evidence here tending to show that this accident occurred through a signal given by the mate of the vessel—I think one of the witnesses testified that the mate gave the signal, and it is indeed charged in the complaint that it was done by the foreman—and it was a hasty signal and by reason of that fact the winchman raised this iron beam at a time when he should not have done so, and caused the injury to the plaintiff. Now, if Swain & Hoyt were in charge of the boat at the time, not as agents for the owners but on their own account, and their employes or those over whom they had charge,—the foreman if they had charge of the foreman—through negligence gave a signal at a time when they should not have given a signal, and on this account the injury occurred, then they would be responsible for it under the Oregon statute, because it makes the foreman in such case the representative of the master.

Now, I think this covers all the questions of law involved in this case except some general instructions and the rule as to measure of damages.

In a case of this kind an employer is not an insurer. He doesn't guarantee that his employe shall not be injured nor is the mere proof of an injury or an accident proof of negligence, but before a plaintiff can recover in an action of this kind he must show by a preponderance of the

(Instructions given to Jury.)

evidence that his injury was due to the negligence of his employer, and negligence means, in that connection, the want of reasonable care, the want of such care and caution as a reasonably prudent man would have exercised under the same circumstances. That is the definition and guide in this case.

Now if you find that the plaintiff is entitled to recover in this case, it will be necessary for you to determine the amount of his damages. Upon that question there is no fixed rule, no rule of law the court can announce to you; each case depends upon its own facts. The purpose to be accomplished is to arrive at a monetary consideration as nearly as possible sufficient to cover the injury. It is a difficult matter to do and there is no standard by which it can be determined. In an action concerning matters that have a market value, there is a standard by which we can ascertain the amount of recovery, but when it comes to a personal injury there are no such standards, and there is no definite rule that the court can lay down for the guidance or determination of the jury. It is, after all, left to the good judgment and sound discretion of a jury. In estimating the damages, you should consider the age of the plaintiff; his expectancy of life which is said to be 21 years, or whatever is stated in the complaint; the pain and suffering that he endures, if any, on account of this accident; his impaired earning capacity on account thereof; the length

(Instructions given to Jury.)

of time he was out of employment due to the injury; the effect upon his future earning capacity if any, and the effect upon his health, if it is impaired by [10 Bill of Exceptions] [115] reason of the injury; his ability to attend to his own affairs and pursue his ordinary calling, and all these circumstances, and then determine what amount of damages he is entitled to not exceeding the amount specified in the complaint which is ten thousand dollars.

Now the complaint charges that by reason of being struck by this iron he was permanently injured and bruised in the knee joint. Upon the question of the permanency of the injury the burden of proof is upon the plaintiff to establish by a preponderance of the evidence, and unless you can say by a fair preponderance of all the evidence that there is a permanent injury, then you should conclude that he was not permanently injured, that is that the injury was not a permanent one, and consider that in estimating the amount of damages.

You are the exclusive judges of all questions of fact in this case, and you are the exclusive judges of the credibility of the witnesses. Every witness is presumed to speak the truth. You have heard them testify and it is for you to say what weight is to be given to their testimony, and if at any time during the trial the court intimated its views upon any question of fact in this case, or upon what a witness testified or his credibility,

(Instructions given to Jury.)

you are to disregard it unless it conforms to your own views, for these questions are exclusively for you and you must determine them upon your own responsibility and not upon that of any one else.

Mr. Giltner: If the court please, I object to the instructions given by the court to the jury here about the liability of Swain & Hoyt if the accident happened on the boat. There is no testimony to show that any accident happened on this boat; it happened on the wharf.

Court: I will correct that. If I said happening on the boat I referred to the accident charged in the complaint and the foundation of this action.

And it is now certified by the undersigned United States District Judge for the District of Oregon, sitting at the trial of this action, that the foregoing bill of exceptions contains substantially all of the evidence offered and received at the trial, with the exception of the evidence as to the extent, nature, and character of the plaintiff's injuries and the damages sustained by him and upon these questions the evidence was conflicting. The foregoing bill correctly states the several exceptions taken and allowed in behalf of defendant and inasmuch as the foregoing is not fully of record in this cause I have settled and certified this bill of exceptions and order that the

170 *Swayne & Hoyt, Inc., a Corporation,*

(Instructions given to Jury.)

same be filed and spread of record in the cause
as of the date of the judgment.

Dated August 25th, 1914.

R. S. Bean,
United States District Judge,
District of Oregon.

[11 Bill of Exceptions] [116]

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record upon Writ of Error in the case of Gustav Barsch, Plaintiff and Defendant in Error against Swayne & Hoyt, Inc., a corporation, Defendant and Plaintiff in Error, in accordance with the law and the rules of this Court, and the stipulation signed by counsel for the respective parties and filed in said cause, and that the said transcript is a full, true and correct transcript of the proceedings had in said Court, in accordance with the said stipulation, as the same appear of record and on file at my office and in my custody. And I further certify that the cost of the foregoing transcript is \$....., for Clerk's fees for preparing said transcript, and \$....., for printing said transcript, and that the same has been paid by the said Plaintiff in Error.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Portland, in said District, on the day of, 1914.

.....
Clerk.

No. 2510

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWAYNE & HOYT, INC.

(a corporation),

Plaintiff in Error,

vs.

GUSTAV BARSCH,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

IRA A. CAMPBELL,

Attorney for Plaintiff in Error.

Filed this.....day of February, 1915.

Filed
FRANK D. MONCKTON, Clerk.

FEB 15 1915

By.....Deputy Clerk.

F. D. Monckton,



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United States Circuit Court of Appeals

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SWAYNE & HOYT, INC.

(a corporation),

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GUSTAV BARSCH,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of the Case.

This writ of error is brought to reverse a judgment of the District Court for the District of Oregon.

The action was brought by Gustav Barsch, the defendant in error, to recover for personal injuries which he claimed to have sustained by reason of the negligence of Swayne & Hoyt, Inc., while in the employ of the latter as a stevedore upon a dock in the City of Portland. The action was tried before a jury, which returned a verdict for Barsch in the sum of \$1400.

The accident out of which Barsch's injuries arose occurred about 7:30 on the evening of March 31, 1913.

Barsch had been engaged throughout the day, together with other stevedores, in unloading the steamship "Camino", which then lay alongside a wharf, known as the American-Hawaiian Steamship Company's Wharf, or Albers Wharf No. 3, on the waterfront in the City of Portland. At the time of the accident Barsch was assisting in unloading a steel beam from the hold of the "Camino". The beam had been taken from the hold of the "Camino" by means of a hoist and winch operated on the deck of the vessel and had been lowered to the floor of the dock. Barsch was engaged in unfastening one of the two cables which had been attached to the ends of the beam, and, before he had completed his operations, the winch driver started his engine, with the result that one end of the beam was suddenly lifted and struck Barsch. In his complaint, Barsch charged the plaintiff in error with the negligence of the winch driver in starting his engine, and, furthermore, with negligence in failing to furnish a system of communications, by means of signals, between the winch driver and the stevedores working on the dock, and in failing to supply a hatch tender who might have given a proper signal and prevented the accident.

The principal question upon this writ of error is whether or not, upon the undisputed evidence submitted to the jury at the trial thereof, the plaintiff in error herein, Swayne & Hoyt, Inc., can be held responsible to defendant in error, conceding that the defendant in error was injured to the extent found by the jury and by the negligent act or omission of someone. The

principal question here presented is disclosed by the following statement which the trial court made to the jury in the opening portion of his instructions:

“Now, before it becomes necessary for you to consider the question of negligence it will be important for you to determine whether or not Swain & Hoyt are liable for this accident, if anybody is liable for it. It is not claimed, nor is there any evidence tending to show that Swain & Hoyt owned the steamer ‘Camino’. There is no evidence nor is it claimed that Swain & Hoyt were the charterers of the vessel. The only testimony in reference to that matter is that they are what is referred to and denominated as managing agents, that is that they were acting for the owners.” (Trans. pp. 159-160.)

Swayne & Hoyt, Inc., did not own the “Camino”. It was owned by the Western Steam Navigation Company. Swayne & Hoyt, Inc., were what was known as the “managing agent” for the owner. We shall therefore review the facts briefly relating to this phase of the case, showing the exact relation of Swayne & Hoyt, Inc., to the Western Steam Navigation Company as such managing agent, and the exact relation which Swayne & Hoyt, Inc., and the Western Steam Navigation Company bore to the defendant in error herein, Gustav Barsch, at the time of his injury.

Swayne & Hoyt, Inc., was a California corporation, with its principal place of business in San Francisco. The steamer “Camino” was one of a number of steamers owned and operated by the Western Steam Navigation Company, plying between the ports of San Francisco, Portland and Seattle, and known as the “Arrow Line”.

Swayne & Hoyt., Inc., acted as the "managing agent" in behalf of the Western Steam Navigation Company for the said Arrow Line, and, in particular, for the steamer "Camino".

On March 31, 1913, and for some months prior thereto, one C. D. Kennedy was employed by Swayne & Hoyt., Inc., as such managing agent, to act as "local agent" in Portland, Oregon. Kennedy paid all bills contracted for the ships of the Arrow Line while they were in Portland, including the stevedoring bill, collected freight that became due to the ship in Portland, and then forwarded an account to Swayne & Hoyt, Inc., in San Francisco. These accounts were rendered, on the average, every ten days.

Kennedy testified upon direct examination that he was employed as local agent for Swayne & Hoyt, Inc., and that he was employed by Swayne & Hoyt, Inc. He later admitted, upon cross-examination, however, that he was engaged by Mr. Moran; that Mr. Moran, while an officer of Swayne & Hoyt, Inc., was also an officer of the Western Steam Navigation Company and was in charge of its shipping department (Trans. p. 21). He also admitted that his correspondence with Mr. Moran might have been written by Mr. Moran either in behalf of Swayne & Hoyt, Inc., or the Western Steam Navigation Company (Trans. p. 22). He finally acknowledged that he knew that Swayne & Hoyt, Inc., were merely general agents for the Arrow Line and that he merely represented them as such agents.

We quote the following pages from Mr. Kennedy's cross-examination as establishing conclusively that he

merely acted as agent for Swayne & Hoyt, Inc., in its capacity as managing agent for the Western Steam Navigation Company.

“Q. Now, what relation, do you know, from your conversations you have had with the members of the Swayne & Hoyt Company at the time you were appointed agent that you spoke of—what relation did Swayne & Hoyt have in connection with these boats? What do they call themselves?

A. General agents for the Arrow Line.

Q. General agents for the Arrow Line?

A. Yes, sir.

Q. Now, in handling these matters, they were not the officers or owners—you knew that, did you not?

A. I didn't know that. I don't presume they were the owners. Might have been part owners.

Q. You considered them as managing agents?

A. Yes, sir.

Q. And as managing agents, you represented them locally in Portland?

A. Yes, sir.” (Trans. pp. 24, 25.)

Finally, Kennedy acknowledged that he was nothing more than a sub-agent for the Western Steam Navigation Company. Such admission was contained in the following portion of his cross-examination:

“Q. (Mr. GUTHRIE.) And you understood that Swayne & Hoyt were general agents for the owners, handling cargoes?

A. Yes, sir.

Q. And you were really sub-agents, through the agents of the owners, acting through the managing agents. Isn't that true?

A. I presume so, yes.” (Trans. p. 27.)

The positive testimony of Messrs. Hoyt, Moran and Swayne to the effect that Swayne & Hoyt, Inc., never employed Kennedy as its own agent (Trans. pp. 148,

153, 154, 155) was, therefore confirmed by the testimony of Kennedy, himself. It was undisputed.

Kennedy was associated in Portland with the American-Hawaiian Steamship Company, which owned the dock at which the "Camino" was unloading at the time of the injury to Barsch. The American-Hawaiian Steamship Company employed a foreman by the name of Dosch upon this dock, and it was the custom of Kennedy, whenever stevedores were wanted for vessels lying alongside the dock, to make arrangements for their employment through this foreman, Dosch. Dosch had general supervision over the stevedores who were actually employed upon the dock, and, when a vessel would come alongside the dock for unloading, he would ascertain from an officer of the vessel how many stevedores would be needed upon the vessel and then he would determine for himself how many he would want upon the dock for the particular job. He would then telephone to the Longshoremen's Union and request the business agent of the union to send the required number to the dock. E. A. Schneider was at the time, and for some time prior thereto had been, the secretary or business agent of the Longshoremen's Union, and it was to him that Dosch usually applied for stevedores. The employment of Barsch upon the 31st day of March, 1913, took place in this manner. The "Camino" came alongside the American-Hawaiian Dock (also known as Albers Dock No. 3). Dosch ascertained the number of stevedores required by himself and required by the mate to accomplish the unloading, and telephoned to Schneider at the Longshoremen's Union. Schneider

assigned the required number of stevedores to the job, including Barsch. We shall consider later, in an appropriate place, the statements of these various men who had to do with the employment of Barsch as to whom they represented or as to whom they thought they represented, and as to whom they said they represented, at the times when they acted in bringing about Barsch's employment.

No one fact is more significant, however, in determining whether or not Barsch was at the time of his injury in the employ of Swayne & Hoyt, Inc., or in the employ of the Western Steam Navigation Company, than the pay-roll which was signed by him and the other stevedores. This pay-roll was also controlling evidence as to the fact that Kennedy represented the Western Steam Navigation Company and not Swayne & Hoyt, Inc., in so far as he can be said to have employed Barsch and the other stevedores.

The stevedores who were employed by Dosch upon the Albers Dock No. 3 when the "Camino", or any other Arrow Line steamer, unloaded there were paid by Kennedy. At the end of each day the time of the men was figured. Dosch and a man named Williams prepared the pay-roll showing the time earned by the various stevedores and it was then sent to Kennedy's office. The stevedores would then call at Kennedy's office, or authorize Schneider to call for them, and would receive their pay from Kennedy. Each stevedore as he received his pay was required to sign his name and receipt upon the pay-roll. The pay-roll read as follows:

"Received from Captain....., for account of above steamer and her owners." (Trans. p. 26.)

This form of pay-roll was shown to have been in use for some time prior to the 31st day of March, 1913, and Barsch was shown to have receipted upon numerous such pay-rolls prior to that date (Trans. pp. 26, 97-101).

Upon the bow of the steamer "Camino" was painted the following legend: "Arrow Line, Swayne & Hoyt, Managers." It appeared that after his injury, Barsch went to San Francisco and called upon Swayne & Hoyt, Inc., and some investigation of the extent and cause of his injuries was made by Swayne & Hoyt, Inc. Barsch testified that he was sure that he was employed by Swayne & Hoyt, Inc., but practically admitted that his sole reasons for believing so lay in the two facts last mentioned.

The negligence which was alleged to have occasioned Barsch's injury consisted either in the carelessness of the winchman in starting his engine before he received the signal to do so, or in the negligence of the mate of the "Camino" in giving such a signal carelessly, or in the alleged negligence of the owners of the vessel in failing to establish a system of signals between the stevedores upon the dock and the man in charge of the winch, or in failing to supply a hatch tender who might have given a safe and proper signal. If it be assumed, therefore, that Swayne & Hoyt, Inc., either through Kennedy, or in any manner whatsoever, became Barsch's employer, it is nevertheless clear upon the face of the record that Swayne & Hoyt, Inc., is not liable for the negligence charged in the complaint.

Assuming that Dosch, through Kennedy, became the agent of Swayne & Hoyt, Inc., Dosch's authority is not claimed to have extended to the men upon the deck of the "Camino". Neither is it claimed that Kennedy had any control over the men upon the "Camino" or over the methods of unloading which were employed upon the vessel itself. Kennedy testified that under the authority which he obtained from Swayne & Hoyt, Inc., he had no power to give directions of any sort to the mate or any officer of the "Camino"; that he could not, if he had so desired, have ordered the placing of a hatch tender upon the vessel or the installation of a system of signals between the winchman and the stevedores upon the dock. The mate and the winchman were employed and paid by the vessel. The winch and hoisting apparatus were owned by the owner of the vessel and controlled by its own employees. Dosch admitted that he had no control over the winch or what took place upon the vessel.

Under these facts, the ordinary case is presented of a vessel unloading at a dock, employing stevedores to assist in the unloading upon the dock, through an independent agency, and furnishing its own hoisting apparatus and its own employees to handle the same. We shall refer to authorities in the course of our argument which establish conclusively that in such a case the two employments are distinct and separate and that if a stevedore upon the dock is injured by the negligence of a winchman, or negligence of any employee of the vessel, the owner of the vessel is liable and the employer of the stevedore is not liable. Viewed in this light, it

might well be assumed, for purposes of argument, that Swayne & Hoyt, Inc., was the employer of Barsch, and, nevertheless, it would not be liable for injuries occasioned to Barsch by the negligent acts charged in the complaint.

A second question arises upon the record. The plaintiff in error requested the court to charge the jury that the Employers' Liability Act of Oregon of 1911 did not control the case, for the reason that Barsch's employment was a maritime contract, and for the reason that the "Camino" was engaged in interstate commerce and could not be subjected to the safety regulations prescribed in the act without involving a violation of the interstate commerce clause of the federal constitution. The trial court refused to do this and instructed the jury upon the theory that the Employers' Liability Act did control the case.

II.

Specification of Errors.

The points to which we have referred in our opening statement are covered by two of the assignments of error, Assignment I and Assignment IV. Assignment I reads as follows:

"By the uncontradicted evidence in the cause Swayne & Hoyt, Inc., was the managing agent only of the steamship 'Camino', and the court erred in refusing to give the instructions to the jury requested by the defendant to return a verdict for the defendant."

Assignment IV is as follows:

“The court erred in applying as the law of the case the Employers’ Liability Law of Oregon, and in charging to the jury in the course of the charge to the jury that the state’s statutes of the State of Oregon required that all machinery other than that operated by hand power should, whenever necessary for the safety of persons employed in or about the same, or for the safety of the general public, be provided with a system of communication by means of signals so that at all times there may be prompt and efficient communication between employees or other persons and the operator of the motive power, and that a failure to so provide would be negligence within the state’s statutes of the State of Oregon, and would entitle the plaintiff to recover, and that if through negligence in giving a signal at the time when the signal should not have been given, and on this account the injury occurred, then that the defendant, if it was operating the vessel on its own account and not as a managing agent, would be responsible under the Oregon statutes, because the Oregon statutes made the foreman or person giving such signal a representative of the master.”

III.

Brief of the Argument.

The argument for plaintiff in error will be devoted to establishing two points:

A. That the trial court erred in refusing to direct a verdict for the defendant.

B. That the trial court erred in applying the Employers’ Liability Act of Oregon of 1911.

A.

The Trial Court Erred in Refusing to Direct a Verdict for the Defendant.

Our argument upon this point will take the following course:

(1) *Swayne & Hoyt, Inc., Was Merely the Agent of the Owner of the "Camino".*

(a) There was no evidence upon which the jury could find that Swayne & Hoyt, Inc., acted in any way with respect to the "Camino" except in the capacity of agent for the owner.

(b) Although an agent must disclose the identity of his principal, as well as the fact of his agency, it is a sufficient compliance with the rule if the agent discloses that he is agent "for the owners" of a vessel.

(c) Upon the law declared in the court's instructions, the jury should have been directed to find for the defendant. There was no evidence that Swayne & Hoyt, Inc., had any control "upon its own account."

(2) *Swayne & Hoyt, Inc., Was Not Barsch's Employer.*

(a) Swayne & Hoyt, Inc., did not deal with Barsch directly at all.

(b) Kennedy was merely "the sub-agent of the owner, through Swayne & Hoyt, Inc., its agent", and his only authority was to employ Barsch on behalf of the owner. He could not make a contract of employment for Swayne & Hoyt, Inc., with Barsch.

(c) The mate and master of the "Camino" were employees and agents of the owner, and could not employ Barsch in behalf of Swayne & Hoyt, Inc.

(3) *Assuming That Swayne & Hoyt, Inc., Employed Barsch To Act as a Stevedore on the Dock, It Was Not Liable for The Negligence of the Winchman or Mate of the "Camino", Or For The Negligence of the Owner of the "Camino" in Failing to Supply a Watchman or a System of Signals.*

(a) The winchman and the mate were employees of the owner—there was no testimony to the contrary.

(b) Under the uncontradicted evidence, the foreman, Dosch, had no control of the operations upon the vessel.

(c) When two masters engage in a common undertaking, one of them is not liable to his servant for an injury occasioned by a servant of the other.

(1) **SWAYNE & HOYT, INC., WAS MERELY THE AGENT OF THE OWNER OF THE "CAMINO".**

(a) There was no evidence upon which the jury could find that Swayne & Hoyt, Inc., acted in any way with respect to the "Camino" except in the capacity of agent for the owner.

Mr. John G. Hoyt, the vice-president of Swayne & Hoyt, Inc., testified that he was familiar with the rela-

tionship of the defendant with the steamship "Camino" on March 31, 1913, and that "such relationship was that of managing agent" (Trans. p. 148).

Mr. A. A. Moran testified that he was manager of the shipping department of the defendant and that on March 31, 1913, "the defendant sustained the relation of managing agent for the Western Steam Navigation Company, owners of the 'Camino'" (Trans. p. 148).

Mr. R. H. Swayne, the president of the defendant, testified that on March 31, 1913, "the defendant sustained the relationship of agent for the Western Steam Navigation Company, owners of the 'Camino'" (Trans. p. 148).

We have already referred to the testimony of Kennedy upon this subject in our opening statement. Kennedy's final statement was that he considered Swayne & Hoyt, Inc., "as managing agents" (Trans. p. 24); "that as managing agents he represented them in Portland" (Trans. p. 25); that he was really a sub-agent "through the agents of the owners, acting through the managing agents" (Trans. p. 27).

Dosch, the man who telephoned to the union and told Schneider to send Barsch and the other stevedores to the American-Hawaiian Dock to unload the "Camino", says that he did not tell Schneider that he wanted men to work for Swayne & Hoyt, Inc.; that he never did employ men for Swayne & Hoyt, Inc.; that it was his custom in ordering men

"merely call for the men, say I want thirty men at seven o'clock at such and such a dock, for such

and such a steamer; whether the 'Camino', the 'Navajo' or the 'Paraiso', whatever ship wants men." (Trans. pp. 135, 136.)

Confirming this testimony of Dosch is the testimony of Schneider, who received the calls for stevedores at the union headquarters. Speaking of his understanding of the employment of men who went to various docks pursuant to his instructions after he had received a call for stevedores, Schneider said:

"Q. And when these men were sent down to the steamer by you, didn't you send a list of these men down for the timekeeper to make the roll by?

A. Yes, I sent a list of the men down there, yes, sir.

Q. And at the top of each list, you list them under the steamer, don't you? The steamer, not the dock, don't you? Isn't that the custom?

A. That would have no bearing——

Q. I asked you if it isn't true. I don't care whether you think——

A. Naturally. The custom of the port. You see, a man working in the office, and he gets a call for men; he sends them to the steamer direct, and directs the man what dock the steamer is located.

Q. Yes, that is all I want to know. What I wanted to know was what the fact was.

A. The steamer calls for the men." (Trans. p. 50.)

Barsch's own testimony cannot be taken as testimony to the effect he was actually employed by Swayne & Hoyt, Inc. As we have already pointed out in our opening statement, Barsch's repeated statements that he was employed by the plaintiff in error amounted to nothing more than Barsch's own conclusion based upon two circumstances. Barsch testified that he was sure he

was employed by Swayne & Hoyt, Inc., notwithstanding the fact that at an earlier date he was shown to have verified a complaint in which he swore his employment at the time he was injured was by the American-Hawaiian Steamship Company. The following extracts from Barsch's testimony show that his statement as to his employment by Swayne & Hoyt, Inc., was merely such conclusion:

“Q. Who told you that you were going down there to work for Swayne & Hoyt?

A. I seen Swayne & Hoyt's name on the bow of the 'Camino'.

Q. And when you saw that name on the 'Camino', that is the way you knew you were working for Swayne & Hoyt?

A. Why, certainly, must be the way. If you see a name on the ship, that is the company.

Q. Well, you saw the name there, but as I understood it, that name said 'Manager'. It didn't say they operated the boat for themselves, but said 'Manager', didn't it? Didn't it say 'Swayne & Hoyt, Managers'?

A. Swayne & Hoyt, Managers?

Q. Swayne & Hoyt, Managers.

A. I guess it may be that. I only looked at the Swayne & Hoyt name. May be Swayne & Hoyt, Managers.

Q. So you were sure you were working for Swayne & Hoyt?

A. Yes.

* * * * *

Q. * * * Now, you weren't so sure whether Swayne & Hoyt when you sued the American-Hawaiian Steamship Company, were you?

A. I wasn't so sure.

Q. Then why did you say awhile ago, you knew it was Swayne & Hoyt?

A. I knew it was Swayne & Hoyt—I seen the name on it.” (Trans. pp. 89, 90, 92, 93.)

The first basis for Barsch's conclusion was, it is apparent from the foregoing testimony, the fact that he saw the sign upon the bow of the "Camino". The second basis for his conclusion was, according to his testimony, something that occurred weeks after the happening of the accident, namely, the alleged dealings which he had with Swayne & Hoyt, Inc., with relation to his alleged injuries. This is made to appear in the following portion of his examination:

"I was working for Swayne & Hoyt, I found out afterwards." (Tr. p. 96.)

* * * * *

"Q. You thought you would sue both companies?

A. I didn't know exactly whether they were operated by Hawaiian Company, or whether they were operated at that time directly by the Swayne & Hoyt people.

Q. And you found you were mistaken about the American-Hawaiian people, is that right?

A. I was mistaken.

Q. And you might just as easily be mistaken now about Swayne & Hoyt?

A. No.

Q. Why shouldn't you?

A. No, no mistake there.

Q. What difference can there be?

A. The difference be because they acknowledged they had; they acknowledged it?

Q. When did they acknowledge it?

A. In San Francisco, when I was there." (Trans. pp. 94, 95.)

In the foregoing we have the version of every individual who could possibly have had anything to do with the employment of Barsch upon the 31st day of March, 1913, to assist in the unloading of the "Camino". Before any connection can be established between Barsch

or the intermediary actors in the transactions, namely, Schneider and Dosch, it is necessary to show that Kennedy was the agent of Swayne & Hoyt, Inc. We find Kennedy testifying that he was not the agent of Swayne & Hoyt, Inc., but that through Swayne & Hoyt, Inc., he was the sub-agent of the owner of the "Camino". Kennedy had no direct dealing with Barsch prior to the accident. We then find that Dosch, who telephoned the union for the men, positively swore that he did not mention Swayne & Hoyt's name; that in all of his course of dealings with the stevedores he had never employed men for Swayne & Hoyt, Inc. We think it well here to quote Dosch's description of his transactions with the stevedores. Dosch testified:

"Q. State to the jury what is the method by which you employ men, or by which you send orders to the secretary for men to come down to the dock.

By Mr. GILTNER. I think he should ask what he did at this time, at the employment of Barsch, instead of going over the whole thing.

Q. Very well, then, I will try to state it definitely. Can you recollect the procedure you went through in securing men to come down to the wharf to work on the steamship 'Camino' about the 31st day of March, 1913?

A. Well, we always used just one system, that is, if we want longshoremen; when ordered to get longshoremen, or need them myself, I usually telephone or call at the hall, and get hold of the business agent of the union, and tell him I want so many men to work, such and such a boat, at such and such an hour, whatever it may be.

Q. In any of these interviews which you have had, either personally or by telephone, with the business agent, did you represent to the business agent that you wished men to work for Swayne & Hoyt?

A. Not necessarily, no, sir. At no time; never did.

MR. GILTNER. What was that answer? Not necessarily?

A. No, sir; never did.

Q. Did you ever employ men for Swayne & Hoyt?

A. No, sir, not that I know of.

Q. What is your best recollection of the 31st day of March, 1913? Did you employ men for Swayne & Hoyt that day?

A. Well, I couldn't say, because I never do use any name at all. Never even used American-Hawaiian Steamship Company when I order men; merely call for the men, say I want 30 men at seven o'clock at such and such a dock, for such and such a steamer; whether the 'Camino', the 'Navajo', or the 'Paraiso', whatever ship wants men.' (Trans. pp. 134, 135, 136.)

According to Dosch, therefore, Swayne & Hoyt, Inc., did not enter into the transaction either as principal or agent.

Schneider, who received Dosch's message, testifies as follows:

"Q. State if you had anything to do with the hiring of the men for the unloading of the steamship 'Camino'?

A. Yes, sir. I had.

Q. On the 31st day of March, 1913, and with whom, and tell what took place.

A. Well, Mr. Dosch phoned for the men——

Q. What is that?

A. Mr. Dosch.

Q. What was the conversation that took place between you?

A. He wanted so many men for the dock, and so many men for the ship. You see the ship carries a crew of eight, you know, and they always want a

few extra longshoremen, you know, to work in the hold with the sailors, to make up two gangs.

Q. Did Mr. Dosch say for whom these men were, or anything? What was the conversation?

A. The conversation was that he wanted so many men down there on the Swayne & Hoyt dock, the American-Hawaiian dock, or Swayne & Hoyt boat.

Q. Who for? What for?

A. The Swayne & Hoyt people.

Q. And for what purpose?

A. For discharging the vessel.

Q. For the Swayne & Hoyt people?

A. Yes, sir." (Trans. pp. 40, 41.)

This testimony is qualified, however, by Schneider, who later said: "The steamer calls for the men" (Trans. p. 50).

Finally, we have Barsch's version of his employment. As we have said, Barsch's repeated statements that he was employed by Swayne & Hoyt, Inc., were shown to have rested upon two circumstances, neither of which afforded legal justification for a finding that Barsch's employment was by Swayne & Hoyt, Inc.

The statements by Schneider and Barsch are the only statements in the record which we have been able to find which bring Swayne & Hoyt, Inc., into the transaction of Barsch's employment in any capacity whatsoever; that is to say, either in the capacity of agent or of principal. But giving these statements by Schneider and Barsch, qualified later though they were, the fullest possible effect, they were not evidence of an employment by Swayne & Hoyt, Inc. "*upon its own account*". Schneider did not say that when Dosch telephoned for the men to go to the Swayne & Hoyt dock to work "for

the Swayne & Hoyt people'', Dosch told him that Swayne & Hoyt, Inc., were employing Barsch, or the other stevedores, itself and "on its own account''. He did not know, and he did not say he knew, that Swayne & Hoyt, Inc., were acting as independent employers; on the contrary, Schneider later affirmed that the men were called for ordinarily by the ship.

Neither was Barsch's testimony, which we have shown to have been based upon erroneous conclusions, to the effect that he was working for Swayne & Hoyt, Inc., as principal, rather than as agent.

One additional fact in the record, however, is conclusive against the claim that the testimony of these two men should be held sufficient to show an employment by Swayne & Hoyt, Inc., in its individual capacity. The pay-roll which Barsch signed on this occasion, as on many other occasions, and which it was shown had been in common use for some time, was conclusive evidence that whatever contract these men made, either with Kennedy or with Dosch, or with Swayne & Hoyt, Inc., was a contract of employment between the men and the owner of the "Camino''. Whosoever consummated that contract between the stevedores and the owner, whether it were Kennedy or Dosch or Schneider, consummated it acting in behalf of the owner of the vessel. The receipt read as follows:

"Received from Captain....., for account of above steamer and her owners." (Trans. p. 26.)

This receipt was absolute notice to all the men that their employment was by and on behalf of the owner

of the "Camino". It was absolute evidence, binding upon Barsch, that he was paid by the owner.

(b) Although an agent must disclose the identity of his principal, as well as the fact of his agency, it is a sufficient compliance with the rule if the agent discloses that he is agent "for the owners" of a vessel.

It is the general rule that an agent, if he would avoid liability upon a contract which he enters into in his capacity as agent, must disclose not alone the fact of his agency, but the identity of his principal. But it is unnecessary in all cases that the agent should give the *name* of his principal in order to avoid liability upon the contract. The identity of the principal may be disclosed "by description as well as by name", and, under this rule, it has been held directly that there has been a sufficient disclosure where an agent makes a contract "for the owners of a ship".

I Mechem on Agency, Second Edition, Paragraph 1412, p. 1042.

"The identity of the principal may be disclosed by description as well as by name, as where the agent made a contract 'for the owners' of a ship named; and the agent may sufficiently exclude personal responsibility by expressly stating that the contract is made for and on account of his principal, although the principal is not directly named."

A direct application of the rule above stated to the facts of the present case is found in the case of

Waddell v. Mordecai, 3 Hill (S. C.) L. 22.

In that case the defendant, Mordecai was captain of the brig "Enconium". He entered into a contract with

the plaintiff to transport twenty-five or thirty slaves from Charleston to New Orleans, and received on account of the fare one hundred dollars, giving the owners the following receipt:

“February 1, 1834. Received from Mr. Waddell one hundred dollars, on account of passage of slaves on board the brig ‘Enconium’. For the owners.
(Signed) M. C. MORDECAI.”

The vessel was lost through the negligence of the captain and, although the slaves were saved, they escaped. The action was brought to recover the one hundred dollars which the plaintiff had paid Mordecai. It was held that the money was received by Mordecai “for the owners”, and, although he did not disclose the names of the owners of the “Enconium” to the plaintiff, and although the plaintiff did not know the names of the owners, nevertheless, there had been a sufficient disclosure of Mordecai’s principals to avoid the rule that the agent of an undisclosed principal is liable to the party with whom he has attempted to deal for his principal. In dealing with the question as to whether there had been a sufficient disclosure by Mordecai of his agency, the court said:

“What are the facts on this side of the case? Since the verdict, it cannot be questioned that Mordecai paid over the hundred dollars, advanced by Waddell, to the owners of the brig; that he received no timely notice to retain the money; that he acted throughout in good faith; and in the whole transaction appeared as the certain agent of the owners of the brig, though they were not specifically named. Under these facts the decision depends upon the following general rule—‘Standing,’ (says Chanc. Kent, 2 vol. 630, 2d ed.) ‘on strong founda-

tions and pervading every system of jurisprudence—That where an agent is duly constituted, and names his principal, and contracts in his name, the principal is responsible and not the agent,' &c, &c. 'If he, (the agent) makes the contract in behalf of his principal, and discloses his name at the time, he is not personally liable,' &c. Under this general rule, the questions recur,—Did Mordecai name his principal. The answer is, he entered into the contract as agent for the owners of the 'Enconium'—but he did not express or give their paternal or Christian names. Now, is such fullness and precision indispensable, where the communication made is intelligible? I concede that every agent must so disclose his principal at the time of the contract, as to enable the opposite party to have recourse to the principal, in case the agent had authority to bind him, 2 Kent. 631. But I cannot perceive wherein lies the necessity of the agent naming, specifically and severally, every one of a class or company of his principals who are usually designated among men of business by some brief descriptive terms. For instance, were an agent to say, 'the work is to be done for the steamer "Etiwan"', and I am the captain, or for the owners of Fitzsimons' wharf', this would be enough *prima facie*, unless, or until, the agent be called on for a more precise specification of the names of his principals. To require more in every instance, would be very often to require matter utterly superfluous. We have illustrations, that the rule, so construed, is a safe one, in the common practice of clerks of stores, who, perhaps every day, procure goods at a neighboring store, with the laconic expression, 'They are for our house', or the like. That time is equal to money, and business briefly told saves it, are rules drawn from experience, and are at the bottom of such practical brevity; and the frequency of this practice illustrates satisfactorily the received meaning of the rule of law now before the court. It is emphatically

one of every day business, and should be construed with a view to daily convenience.

The agent who communicates plainly, that he acts for another person, informs the party with whom he deals, that he does not intend to be himself responsible. And if he designates intelligibly the party to whom recourse is to be had, he gives the information necessary for the free use of the judgment and discretion of the party dealing with him; and has done his office in this respect for the ordinary purposes of business. As to express adjudications on the precise point, I admit that we have none which might go so far as to declare that an agent need not be plenary and precise in naming all his principals, although they are numerous. But rules for practical business, are rules of convenience and safety for ordinary men. We want them for convenient application to our habitual business. We must, therefore, consult convenience, safety and ordinary business, in applying such rules to practice. * * * It seems to me then very plain, that upon a just exposition of the rule, where more precise information is wanted than that of a general designation of the principal made at the time of the contract, and which may be required, in the course of events, in order to proceed in a suit against the principal, or for, other purposes, such extra information should be sought for by the party requiring it; and if the agent refuses to give it, he may be still liable; and this is the meaning of the judge in the case of *Owen v. Gooch*."

While the case just cited directly covers the case before us, there are not wanting other applications of this rule. In

Lyon v. Williams, 71 Mass. 557,

a contract was involved which had been entered into by the agent of certain railroad corporations who signed

his name at the foot of the contract, "G. Williams, Jr., For the Corporations". The contract was a contract of carriage and was entered into between the plaintiff and Williams, the latter acting as agent for certain connecting carriers between Boston, Mass., and Zanesville, Ohio. The names of the carriers were nowhere mentioned in the body of the instrument and it was shown that there were many lines between Zanesville and Boston which might have been meant by the term "for the corporations". Nevertheless, the court held that there had been a sufficient disclosure by Williams of the identity of his principal to exonerate him from liability as an undisclosed agent. The court said:

"The case stated is clearly a case of agency, and that agency disclosed upon the face of the contract. Such being the case, the action for any breach of the contract should be brought against the principal.

No doubt, in many cases, the agent, by the recitals in the contract and by the form of his signature to the contract, imposes upon himself the responsibility of the performance of the contract. But here the written contract is in direct terms that of others, and not of the defendant. 'The several railroad companies between Boston and Zanesville agree', and the defendant signs 'for the corporations'. The contract also limits the extent of the liability of each of the railroad corporations to its own line.

But it is said that the names of these corporations are not stated. This is true; but they are capable of being made certain by proper inquiry, and the plaintiff was content to take a contract thus generally designating the parties with whom the liability was to rest for the safe and proper conveyance of the goods. If we are correct in the

view we have taken as to who are the parties to the contract, no difficulty arises as to the other points taken by the plaintiff. If the defendant, as servant of the railroad corporation which first received the goods, and whose duty it was to carry them safely to the line of the next railroad company on the route and properly deliver them, has been guilty of any negligence in that respect, and has sent them forward on a wrong route, the proper party to be resorted to, in an action for damages for such negligence, is the principal, and not the agent."

In

Pike v. Ongley, 18 Queen's Bench, Div. 708,

it was held that a hop broker who made a sold-note "for and on account of owner", sufficiently disclosed his principal to escape liability as an undisclosed agent. The trial court held that the signature of the agent "for and on account of the owner" was a sufficient disclosure. Day, Justice, said:

"It is clear from a series of decisions that where the contract sued upon has been made by a broker 'for' or 'for and on account of' an undisclosed or foreign principal, the broker is not primarily liable. That is the result of the decision in *Gadd v. Houghton* (3), where the Court of Appeal held that where the words 'on account of' were inserted in the body of a contract, the broker was not personally liable. That case is binding and conclusive, and we must hold that in the present case, where goods have been sold 'for and on account of' an owner (the owner not having been named), the brokers are not primarily liable. That is a convenient expression to use."

The case was taken to the Court of Appeal, and, in that court, Lord Esher, the Master of Rolls, and Fry,

L. J., held that the first conclusion of the trial court was correct, although the trial court erred in excluding evidence of a local custom which made the agents liable as principals.

The application of these authorities to the case at bar is patent. In the case at bar there was no written contract signed by Swayne & Hoyt, Inc., "as agent for the owners of the 'Camino'." We contend that there was no evidence whatever of any contract, parol or otherwise, between Swayne & Hoyt, Inc., as agent or as principal, and Barsch. Whatever contract might have been shown, however, must have rested in parol. This being the case, the contract was to be gathered from all available sources showing the situation, intention and dealings of the parties.

Upon the undisputed evidence, every one of the persons who had anything to do with the alleged contract between Swayne & Hoyt, Inc., and Barsch had a clear understanding that Swayne & Hoyt, Inc., was acting in all of its dealings with the "Camino" "as agent for the owner". Kennedy knew that Swayne & Hoyt, Inc., was the agent for the owner. He so testified, stating that he, himself, represented the owner as a sub-agent through Swayne & Hoyt, Inc., its agent. Kennedy, Dosch, Schneider and Barsch, himself, had absolute knowledge of this, because of the pay-roll. Schneider signed this pay-roll for various members of the stevedoring gang, and Barsch, himself, was shown to have signed the pay-roll many times prior to the employment during which he was hurt.

It appears as conclusively in this case that if Swayne & Hoyt, Inc., entered into any contract at all with Barsch it entered into it as agent for the owner of the "Camino" as it would have appeared if the contract had been in writing and had contained a statement that Swayne & Hoyt, Inc., signed it "as agents for the owners". Therefore, there having been a disclosure of the identity of the principal for whom Swayne & Hoyt, Inc., was acting, the rule of the above cases governs, and plaintiff in error cannot be held liable to Barsch.

(c) Upon the law declared in the court's instructions, the jury should have been directed to find for the defendant. There was no evidence that Swayne & Hoyt, Inc., had any control "upon its own account".

An analysis of the district judge's charge to the jury discloses that the learned judge told the jury—

1. That under the undisputed evidence Swayne & Hoyt, Inc., was not the owner or charterer of the "Camino", but was "the managing agent" for the owner of the "Camino" (Trans. p. 160);

2. That the mere fact that Swayne & Hoyt, Inc., was the managing agent for the "Camino" would not render it liable to Barsch for the negligence charged in the complaint (Trans. p. 160);

3. That assuming Swayne & Hoyt, Inc., actually employed the plaintiff and actually employed and controlled the officers and crew of the "Camino", nevertheless, Swayne & Hoyt, Inc., would not be liable to the plaintiff unless it employed the plaintiff and unless it employed

and controlled the officers and crew of the "Camino" "on its own account", as distinguished from its capacity as managing agent. In this regard, the court said:

"Before they could be held responsible for an accident occurring on the boat, it must appear that they themselves, on their own account, were in charge of the boat at that time, operating it and directing the men and the course of procedure, and that through some negligent act of theirs the injury occurred, and unless that appears in this case, then there is no liability against Swain & Hoyt, whatever liability there may be against other parties." (Trans. p. 162.)

Again, the court told the jury:

"You are instructed, as I have said, that if they were the mere managing agents acting for the owners and not for themselves, there is no legal liability against them in this case, unless you should find from the testimony that they were, on their own account, in charge of this vessel at the time of this accident or controlling the movement of these men for themselves and not for their principals, and upon this question the burden of proof is upon the plaintiff to prove that defendant, Swain & Hoyt, was not only the employer of the plaintiff, but that they were in charge and in control of the method of handling the cargo, and unless he has satisfied you by a preponderance of the proof upon this question, then you have no further concern with this litigation. It would simply be a case where the liability, if there is any liability, is on behalf of some one else other than the defendant in this case.

If, however, you should find that Swain & Hoyt were in control of this vessel at the time of this accident, on their own account, and that by reason of that fact they are liable for this injury, if there

was an injury, and if anybody was injured, then it will be necessary for you to consider the other phase of this case." (Trans. pp. 163, 164.)

Under the law declared in the foregoing instructions, the jury was told that Swayne & Hoyt, Inc., was not liable to Barsch unless it exercised control over the unloading of the "Camino" and exercised it not in the capacity of agent for the owner of the "Camino", but on its own account. We submit that there is not one iota of evidence in the record that Swayne & Hoyt, Inc., had any connection whatever with the "Camino" except as agent for the owner. Not one witness so testified. Barsch and Schneider testified that they thought Barsch's employment was by Swayne & Hoyt, Inc., but they did not pretend to say whether Swayne & Hoyt, Inc., was acting as an agent or "on its own account". On the other hand, all of the other witnesses testified emphatically that Swayne & Hoyt, Inc., had nothing to do with the "Camino" whatever, except as agent for the owner of the "Camino".

(2) SWAYNE & HOYT, INC., WAS NOT BARSCH'S EMPLOYER.

(a) Swayne & Hoyt, Inc., did not deal with Barsch directly at all.

The office of Swayne & Hoyt, Inc., was in San Francisco. Barsch never saw any officer of the company until weeks after the accident. Unless Kennedy was the agent of Swayne & Hoyt, Inc., no contractual relation could have arisen between Barsch on the one hand and Swayne & Hoyt, Inc., on the other.

(b) Kennedy was merely "the sub-agent of the owner, through Swayne & Hoyt, Inc., its agent", and his only authority was to employ Barsch on behalf of the owner.

Kennedy, as we have shown, is relied upon to establish a contract of employment between Swayne & Hoyt, Inc., and Barsch. If we can establish, therefore, that Kennedy was never constituted the agent of Swayne & Hoyt, Inc., we shall have answered the contention that any contract of employment entered into by him would be binding upon Swayne & Hoyt, Inc. Hoyt, Swayne and Moran testified positively that Swayne & Hoyt, Inc., never employed Kennedy as its agent. Kennedy, himself, testified upon cross-examination that all of his dealings with Swayne & Hoyt, Inc., were with it as the agent for the owner of the "Camino". We have already referred to his final statement that he was a "sub-agent for the owner through Swayne & Hoyt, Inc., its agent".

Upon the authorities which we have referred to under the last subdivision, there was a sufficient disclosure of the identity of Swayne & Hoyt, Inc.'s principal to prevent Swayne & Hoyt, Inc., from being liable upon any contract entered into on their behalf. Consequently, although Kennedy did not know the names of the owners of the "Camino", nevertheless, Swayne & Hoyt, Inc., would not be liable upon its own account to Kennedy by reason of the contract which it entered into with Kennedy as agent for the owner of the "Camino". The result is that if a contract of agency was entered into by Swayne & Hoyt,

Inc., and Kennedy, that contract was entered into by Swayne & Hoyt, Inc., as agents for the owner. Under it Kennedy became agent for the owner of the "Camino" and not agent for Swayne & Hoyt, Inc. As Kennedy was thus not an agent for Swayne & Hoyt, Inc., he could not have made any contract of employment with Barsch, or anyone else, which could be binding upon Swayne & Hoyt, Inc.

- (c) The mate and master of the "Camino" were employees and agents of the owner, and could not have employed Barsch on behalf of Swayne & Hoyt, Inc.

The evidence was uncontradicted that Swayne & Hoyt, Inc., did not employ the officers and crew of the "Camino". The district judge so instructed the jury, saying:

"Now, there is no evidence in this case as I recall it, that the master or officers of this vessel were employed by Swain & Hoyt on their own account. There is some testimony indicating that they were employed by this firm, but unless there is testimony tending to show that they were employed on account of Swain & Hoyt, the inference would be, since they were agents for the owners, that they were employing them for the owners of the vessel and that they became the agents and employes of the owners of the vessel and not Swain & Hoyt." (Trans. pp. 165, 166.)

This being the case, the master or mate of the vessel could not have made a contract of employment with Barsch on behalf of Swayne & Hoyt, Inc. Indeed, there was no attempt to put in any evidence showing this to have been the fact.

(3) ASSUMING THAT SWAYNE & HOYT, INC., EMPLOYED BARSCH TO ACT AS A STEVEDORE ON THE DOCK, IT WAS NOT LIABLE FOR THE NEGLIGENCE OF THE WINCHMAN OR THE MATE OF THE "CAMINO", OR FOR THE NEGLIGENCE OF THE OWNER IN FAILING TO SUPPLY A HATCH TENDER OR SYSTEM OF SIGNALS.

(a) The winchman and the mate were employees of the owner—there is no testimony to the contrary.

We have already shown that the court instructed the jury that there was no evidence that Swayne & Hoyt, Inc., employed the crew of the 'Camino'. How clearly the line is marked is shown in the testimony of the timekeeper, Williams, who said that when the pay-roll was made up he only kept the time of the longshoremen and not of the ship's crew (Trans. p. 133). It is true that Kennedy made the statement that Swayne & Hoyt, Inc., would direct the operations of the officers and crew of the "Camino" (Trans. p. 33), but, upon cross-examination, he completely retracted this statement.

"Q. Now, from some of the questions just asked you a few minutes ago, Mr. Kennedy, respecting the appointment of officers and master and crew, you don't want this jury to understand you know whether or not Swayne & Hoyt appointed these men?

A. No, sir.

Q. You don't know anything about that, do you?

A. No, sir.

Mr. GILTNER. What was the answer you made?

A. I don't know for certain that Swayne & Hoyt employed the master of the 'Camino' or any other of their ships.

Q. And you don't know anything about the appointment of a master?

A. No, sir.

Q. Don't know who employed them or for what purpose?

A. No, sir." (Trans. p. 36.)

We think it will not be controverted that there is no evidence in the record that would enable the jury to find that the winchman or the mate of the "Camino" were employees or under the control of Swayne & Hoyt, Inc.

The negligence upon which the plaintiff relied was:

First: Negligence in the operation of the winch upon the vessel; second, Negligence of the owner in failing to establish a system of signals or means of communication between the stevedores and the winchman; and third, Negligence of the owner in failing to station a hatch tender in a position where he could give signals.

The last two charges of negligence were clearly negligence imputable to the owner of the "Camino".

The testimony as to the negligent operation of the winch placed the responsibility of the accident either upon the shoulders of the mate of the "Camino" or of the winchman. Barsch, himself, testified that "this winch driver went ahead without any notice, didn't give us any notice at all" (Trans. p. 77). The witness Ferguson concurred with Barsch in this statement, thus placing the responsibility upon the winchman (Trans. p. 71). The witness Wolff who worked by the side of Barsch testified, however, that just before the accident the mate of the "Camino" walked along

the dock and gave a signal to the winchman to go ahead (Trans. p. 58).

It is immaterial, however, whether the responsibility rested with the mate or the winchman of the "Camino". Both were employed by the owner of the "Camino". Neither had any connection whatever with Swayne & Hoyt, Inc., nor were either of them employees of that company.

(b) **The evidence is uncontradicted that Kennedy and Dosch were without authority to control what was done on board the "Camino".**

We shall quote direct from the record to establish this point. Kennedy testified as follows:

"Q. Now, in connection with these matters Mr. Kennedy, do you mean the jury to understand from your testimony that you, as local representatives of the managing owners, would have had the right to go down there and direct the captain how to handle his tackle?

A. No.

Q. That is, you were not in active control of the ship's tackle, were you?

A. No, sir.

Q. And Swayne & Hoyt were not through you in that control?

A. No.

Q. So you had no control of handling the cargo as the ship handled it over the ship's rail?

A. No.

Q. That was done wholly, then, by the ship and her officers?

A. Yes, sir.

Q. And they were under the control of the master, were they not?

A. Yes, sir.

Q. And he represented the owners?

A. Yes, naturally.

Q. Now, who operated the winches, do you remember? Men from the ship or men from the Union?

A. I don't know. It was customary for the men from the ship to operate them.

Q. And the 'Camino' was usually operated by her own winches, is that true?

A. Yes, yes." (Trans. pp. 27, 28.)

Kennedy further testified that he could not have caused the installation of a system of signals upon the "Camino". Upon this point, he testified as follows:

"Q. Now, along that same line Mr. Giltner's complaint or Mr. Barsch's complaint in this matter, has three general specifications of negligence. I want to know whether or not you or any one here representing Swayne & Hoyt could have remedied these conditions. Could you have gone down there, and given instructions regarding a system of signals?

A. No, sir." (Trans. pp. 36, 37.)

He also testified that he could not have compelled the master of the "Camino" to employ a hatch tender. Upon this point, his testimony was as follows:

"Q. There is also an allegation of negligence in neglecting and failing to furnish a hatch tender or signal man. Could you or any man here representing Swayne & Hoyt, determine whether they should put a signal man on there, or must that come from other sources?

A. I couldn't.

Q. It was no part of your duty to determine whether to put a hatch tender or signal man there?

A. No, sir.

Q. That is also wholly up to the officers of the ship?

A. Yes, sir." (Trans. p. 37.)

Dosch testified that he had no control as to the method of unloading the cargo from the ship's hold, but that the authority in that regard was vested in the officers of the ship. He likewise said that it would have been beyond his power to have compelled the captain to employ a hatch tender or install a system of signals. His testimony was as follows:

"Q. Your work is general wharf man around there?

A. I am considered chief wharf man down there.

Q. As such chief wharf man, Mr. Dosch, would it have been any of your duty to have instructed the officers or members of the crew, as to what system of signals they should use in unloading the cargo from the ship's hold?

A. No, sir.

Q. Who had charge of the direction of unloading the cargo from the ship's hold?

A. The officers of the ship.

Q. Would it have been any part of your duty to have indicated to the captain that he should put a hatch tender or signal man on the steamer 'Camino'?

A. No, sir.

Q. If you had indicated to the captain that he should put a hatch tender or signal man on the 'Camino', would your orders have been obeyed?

A. I couldn't give orders.

Q. Why not?

A. Because he was in charge of the ship; I had nothing to do with it." (Trans. p. 136.)

Barsch, himself, testified that he took orders from Ahlin, the first mate, as well as from Dosch:

- “Q. Who was the dock foreman over you?
A. Mr. Dosch.
Q. And who was the general superintendent over all of you there?
A. The first officer.
Q. Whom did you say?
A. The first officer—the name was Ahlin.
Q. The mate?
A. Yes, the mate.
Q. Did you take orders from him?
A. Yes.
Q. And also from Mr. Dosch?
A. Yes.” (Trans. p. 83.)

The foregoing testimony was uncontradicted. It establishes conclusively that neither Kennedy nor Dosch exercised any control over the officers or crew of the “Camino” or over the operation of the winch upon the “Camino”, nor could either of them have had any power to say whether a system of signals should be installed upon the “Camino” or a hatch tender employed thereon. It being shown that they did not exercise such control or power at all, Swayne & Hoyt, Inc., cannot be held responsible for their failure to act, under any possible theory. With the record in this condition, we may therefore assume, for the purposes of argument, that Kennedy and Dosch actually became the agents of Swayne & Hoyt, Inc. If we assume this for the purposes of the argument, the case becomes the ordinary case of a vessel employing stevedores to assist in the unloading upon the wharf and supplying its own hoisting apparatus and its own employees upon the deck of the vessel. In other words, if Swayne & Hoyt, Inc., be deemed as the employer of Barsch

and the other stevedores who were engaged upon the dock in unloading the "Camino", nevertheless, it cannot be held responsible for negligence of employees of the owner of the "Camino" engaged in operations taking place upon the deck of the vessel.

- (c) When two masters engage in a common undertaking, one of them is not liable to his servant for an injury occasioned by a servant of the other.

The principle stated in the foregoing heading has been applied on numerous occasions to the relation between stevedores engaged by an independent contractor to assist in unloading a vessel and winchmen employed upon and by the vessel itself. In such cases it has been repeatedly held that where the winchman is negligent and a stevedore upon the dock is injured, the winchman is not a fellow servant of the stevedore and the liability rests with the owner of the vessel. Such was the conclusion of this court in

The Boveric, 167 Fed. 520.

It was there held:

"Where a charter party required the ship to furnish the power, winch, and winchmen for discharging cargo, that is the contribution of the vessel to the common work of discharging, and a winchman so furnished is not a fellow servant with the men of a stevedore, employed by the charterer to do the other part of the work, although the foreman of the stevedores gives the signals for the movements of the winch; and for the negligence of a winchman, resulting in injury to one of such men, the vessel is liable."

Numerous decisions by the federal courts are in accord with the rule of *The Boveric*, supra.

The Slingsby, 120 Fed. 748;

The Gladestry, 128 Fed. 591;

The City of San Antonio, 135 Fed. 879; 143 Fed. 955;

The Lisnacrieve, 87 Fed. 570;

The Victoria, 69 Fed. 160;

Standard Oil Co. v. Anderson, 152 Fed. 166.

See, also, *affirmed 219 U.S. 216.*

Johnson v. Netherlands-American Steam Navigation Co., 30 N. E. 505, New York Court of Appeals, 1892.

The basis of the rule is well stated by Judge Lacombe, speaking for the second circuit, in 1903, in *The Slingsby*, supra, as follows:

“It is well settled that A. and B. may by their respective servants undertake the doing of some particular work, each selecting and paying his own servants, and retaining the right to discharge them from service for proper cause. In such case each servant remains in law the servant of his particular employer, and the circumstance that they all work at the same time and that the orders which direct the joint application of their individual energies are given by some one foreman or overseer or director, does not change their legal relations.”

In the foregoing cases a rule of general application is applied to the precise state of facts which, for the purposes of the argument, we are assuming to exist in the case at bar. Thus, if we assume that Kennedy

and Dosch became agents of Swayne & Hoyt, Inc., it is shown that neither of them had any authority beyond the employment of Barsch and the other stevedores upon the dock at which the "Camino" was unloading. Neither Kennedy nor Dosch had any authority to control the winchman or the mate of the "Camino" or to insist upon the adoption of any rules or system of signals upon the "Camino", or to insist upon the employment of a hatch tender thereon. If, therefore, it be assumed that Swayne & Hoyt, Inc., acted through Kennedy or Dosch, no more can be claimed than that Swayne & Hoyt, Inc., occupied the position of an independent contractor who had engaged to furnish stevedores upon the dock to assist in the unloading of the "Camino".

Viewed in this light, the application of the rule which we have discussed becomes apparent. Treated as an employee of Swayne & Hoyt, Inc., Barsch was not a fellow servant of the mate or winchman of the "Camino". Although he was employed in a common undertaking with them, neither the mate nor the winchman was in the employ of Swayne & Hoyt, Inc., and Swayne & Hoyt, Inc., could not control their actions, nor could it be held liable for their negligent acts.

B.

**The Trial Court Erred in Applying the Employers'
Liability Act of Oregon of 1911.**

Our argument upon this point will take the following course:

(1) *A Stevedore's Employment Is a Maritime Contract, and Is Controlled by the Maritime Law.*

(a) A stevedore's employment is a maritime contract.

(b) The maritime law is to be applied in determining the obligations arising from a maritime contract, and a state legislature cannot enlarge such obligations, nor change the maritime law.

(2) *The "Camino" Was Engaged in Interstate Commerce, and the Safety Appliance Features of the Oregon Employers' Liability Act of 1911 Cannot Be Applied to Her Without Violating the Interstate Commerce Clause of the Federal Constitution.*

(a) Non-action by the Federal government will not permit state legislation directly or indirectly affecting interstate commerce in cases which "by their nature" require a uniform rule.

(b) The necessity for uniformity prohibits state action in respect to safety appliances on vessels engaged in interstate commerce.

(1) A STEVEDORE'S EMPLOYMENT IS A MARITIME CONTRACT, AND IS CONTROLLED BY THE MARITIME LAW.

(a) A stevedore's employment is a maritime contract.

That the contract of a stevedore is a maritime contract, and is governed by the maritime law, is now

regarded as settled. While a stevedore has a maritime lien for services only against a foreign vessel as distinguished from vessels in their home port, nevertheless it has been repeatedly declared in recent decisions of the federal courts that a stevedore's contract, whether with a foreign vessel, or with a domestic vessel in her home port, is to be regarded as maritime in its nature. In a recent decision by the Supreme Court of the United States, handed down in the October term, 1913, Mr. Justice Hughes has collated the numerous federal authorities upon the subject, and has laid down the law authoritatively.

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52; 58 L. ed. 1208, 1212.

We quote from the opinion at page 1212.

“We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class ‘as clearly identified with maritime affairs as are the mariners’.”

Among the numerous declarations of federal judges upon the subject, none is referred to with greater frequency than that of Judge Deady in

The Canada, 7 Fed. 119, 124.

“To my mind it is very plain that the services of a stevedore are maritime in their nature. A

voyage cannot be begun or ended without the stowing or discharge of cargo. To receive and deliver the cargo are as much a part of the undertaking of the ship as its transportation from one port to another. Indeed it is an essential part of such transportation. Freight is not due or earned until the cargo is, at least, placed on the wharf at the end of the ship's tackle. To say that the final delivery or discharge of the cargo is not a maritime service, because it is, or may be, performed partly on shore, is simply begging the question, as it is the nature of the service, and not the place where rendered, that determines its character in this respect."

See also

- Benedict's Admiralty*, 4th Edition, par. 207;
- The Wivanhoe*, 26 Fed. 927;
- The Gilbert Knapp*, 37 Fed. 209;
- The Allerton*, 93 Fed. 219;
- The Seguranca*, 58 Fed. 908;
- The Worthington*, 133 Fed. 725;
- The Main*, 51 Fed. 954;
- Boutin v. Rudd*, 82 Fed. 685;
- The George T. Kemp*, Fed. Cases 5341;
- Norwegian S. S. Co. v. Washington*, 57 Fed. 224.

It has been pointed out that although a stevedore may not in certain cases have a lien in admiralty for his services, his contract remains a maritime contract.

Boutin v. Rudd, supra.

It is our first contention that the relation of master and servant did not exist at all between Swayne & Hoyt and Barsch. But assuming, for the purpose of argument, that such a relation did exist, it is now apparent

that it existed, if at all, by reason of a maritime contract. It will, therefore, be our contention upon this point that the relation having been established by a maritime contract, the mutual obligations of the parties under that contract were governed by the maritime law. They could not be enlarged or changed by any statute of the State of Oregon.

(b) The maritime law is to be applied in determining the obligations arising from a maritime contract, and state legislation cannot enlarge such obligations or change the maritime law.

It is now well understood that the maritime law “which was familiar to the lawyers and statesmen of the country when the Constitution was adopted” became the law of the United States governing matters of maritime cognizance at the time of the adoption of the Constitution.

Section 2 of Article III, United States Constitution:

“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * * to all cases of admiralty and maritime jurisdiction. * * * ”

What this maritime law which was thus adopted by the Constitution as the law of the United States was is defined by Mr. Justice Bradley in

Rodd v. Heartt (The Lottawanna), 21 Wall. 558;
22 L. ed. 654,

at page 662, as follows:

“That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend ‘to all cases of admiralty and maritime jurisdiction’.”

By the ninth section of the Judiciary Act of 1879 (Section 711 R. S.), which has been carried into the present Judicial Code, the cognizance of all cases of admiralty and maritime jurisdiction is vested exclusively in the District Court. By a saving clause, however, there is saved to suitors “the right of a common law remedy, where the common law is competent to give it”. But, as was pointed out by Mr. Justice Field in

The Moses Taylor, 4 Wall. 411; 18 L. ed. 397, 402, the remedy thus saved to suitors “is not a remedy in the common law courts, but a common law remedy”. In other words, suitors may go into a common law court, where such court is competent to afford a remedy, and enforce their rights in accordance with the maritime law. The proposition remains unchanged that as to all matters of maritime cognizance ^{the} ~~and~~ maritime law is to be applied.

The Moses Taylor, supra;

The Glide, 167 U. S. 606; 42 L. ed. 296;

Schuede v. Zenith S. S. Co., 216 Fed. 566.

The states are without the power to modify the maritime law, or to enlarge the rights or obligations arising

thereunder. This was pointed out by Mr. Justice Bradley in

The Lottawanna, supra:

“One thing, however, is unquestionable: the Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States.”

It is again made clear by Mr. Justice Bradley in

Butler v. Boston & Savannah S. S. Co., 130 U. S. 527; 32 L. ed. 1017, at page 1024:

“As the Constitution extends the judicial power of the United States to ‘all cases of admiralty and maritime jurisdiction’, and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the National Legislature, and not in the State Legislatures.

* * *

“The present case, therefore, is clearly within the admiralty and maritime jurisdiction. The stranding of the ‘City of Columbus’ took place on Devil’s Bridge, on the north side of and near Gay Head, at the west end of Martha’s Vineyard, just where Vineyard Sound opens into the main sea. Though within a few rods of the island (which is a county of Massachusetts) and within the jaws of the headland, it was on the navigable waters of the United States; and no state legislation can prevent the full operation of the maritime law on those waters.”

In

Workman v. The Mayor, etc. of New York, 179
U. S. 552; 45 L. ed. 314,

the question was involved as to whether the maritime law or an ordinance of the City of New York governed and determined the liability of the City of New York for damages occasioned by the negligent operation of one of its fire boats. It was held by the Supreme Court that the City was responsible under the principles of the maritime law, and that such law could not be affected by an ordinance of the city. In arriving at this result the court said, speaking through Mr. Justice White:

“The practical destruction of a uniform maritime law, which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States, and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to

the Federal government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright, and commerce clauses of the Constitution. It would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels. This follows if a corporation must, for a wrong by it done, be allowed to escape all reparation upon the theory that, though ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign state.

The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice.”

The necessary result of sanctioning any rule which would permit the states to abrogate, in part or in whole, the admiralty law, is made clear in the following language of Judge Storey in

The Chusan, Fed. Cas. 2717:

“In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of congress, and in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete sur-

render of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have a right to prescribe any rule, they have a right to prescribe all rules, to limit, control, or bar suits in the national courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least, as far as I have any knowledge, either by any state court, or national court, within the whole Union. For myself, I can only say that during the whole of my judicial life, I have never, up to the present hour, heard a single doubt breathed upon the subject.”

Frequent reiterations of the proposition that states may not alter the provisions of the maritime law are found in the opinions of the judges of the various circuits.

The Manhasset, 18 Fed. 918:

“The states of this Union cannot create maritime rights, or rights of action in admiralty; nor can they endow with a maritime right one who is not entitled to that right by the law maritime.”

Mack S. S. Co. v. Thompson, 176 Fed. 499.

In this case Judge Severens said, speaking for the judges of the Sixth Circuit:

“We think the maritime law subsists as an entirety as the subject of Federal jurisprudence, and is to be administered by the Federal courts without impairment by state legislation. If changes are to be made in it, it must be done by Federal authority.”

In

Cornell Steamboat Co. v. Fallon, 179 Fed. 293,

Judge Ward, speaking for the judges of the Second Circuit, pointed out that the relations of parties arising

through a maritime contract were to be determined in accordance with maritime law, saying:

“The contract between the defendant and the deceased is a maritime contract, and establishes their relation as well in courts of law as in courts of admiralty.”

The basic principle declared in the foregoing authorities has been applied to the exclusion of the power of the states to enact employers' liability statutes affecting maritime contracts of employment. The most noteworthy of these cases is the case of

Schuede v. The Zenith S. S. Co., 216 Fed. 566, decided by Judge Killits, of the District Court for the Northern District of Ohio, in June, 1914. The action was brought by Schuede, a seaman employed by the defendant company on the S. S. “Saxona”, in the state court of Ohio to recover compensation in accordance with the Ohio Employers' Liability Act for injuries sustained by Schuede during his employment. The case was removed to the District Court on the ground of diversity of citizenship, and the defendant company pleaded in its answer that its contract of employment with Schuede was a maritime contract and was governed by the maritime law, and that, therefore, the Employers' Liability Act could not apply. The matter before the court was a motion to strike out these portions of the answer. The District Court denied the motion, holding:

“The provisions of the law maritime as to the relation of a seaman to his employment are part of the substance and obligations thereof, which cannot be modified by state law; and in case of an

injury to a seaman in the course of his employment the maritime law determines his rights in an action to recover therefor, to the exclusion of the law of the state where the injury occurred and the suit is brought, whether it is brought in a state or in a federal court.”

Judge Killits said:

“We agree with counsel for defendant that the principles of the general maritime law in force in the United States and not the subject of specific enactment by Congress are to be treated as if actually on the statute books. This must be construed to be the effect of section 2, article 3, of the Constitution, extending the power of the federal courts ‘to all cases of admiralty and maritime jurisdiction’, thus practically adopting the general law of admiralty as the law of this country, and such general law in force when the Constitution was adopted and not modified by act of Congress has the same force and is to be treated with the same consideration which must be given to statutes upon the subject. *Murray v. Chicago & Northwestern Railroad Co.* (C. C.) 62 Fed. 24; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654. A state may not pass any act which abridges or enlarges the responsibilities or duties of maritime law. Rights in admiralty cannot be affected by state enactment. * * *

“As we look at it, the provisions of the law maritime as to the relation of a seaman to his employment are part of the substance and obligations thereof, which cannot be modified by state law, even through recourse to the saving clause of the Code.”

The same result was arrived at by Judge Hazel, speaking for the District Court for the Western District of New York in March, 1912, in

The Henry B. Smith, 195 Fed. 312.

It was there held:

“A right of action for the recovery of damages for personal injuries not resulting in death, arising out of a maritime tort, depends upon the maritime law, which cannot be enlarged by a state statute to give a right of action in rem.”

Judge Hazel said:

“The maritime law, which the libelant invokes, cannot be altered, modified, or changed by state enactment. The right of action arising out of maritime tort, relating to the recovery of damages for personal injuries, depends upon the maritime law, which has been adopted by the laws and usages of the country. The *Lottawanna*, 21 Wall. 588, 22 L. Ed. 654. There is, moreover, no maritime lien by the statutes of this state to support this proceeding in rem, and I am constrained to hold that in an action for personal injuries the Employers’ Liability Act of the state has no application. Rights of action in admiralty are sui generis, and controlled by the maritime law, save in case of death, wherein the states, by legislative enactments, have created liens and rights of action which are not inconsistent with the maritime law.”

* * * * *

“But there is no case which goes so far as to hold that the legislature of the state may modify, alter, or change the maritime law to the extent of enforcing a statute relating to proceedings in rem for personal injuries; and in the absence of controlling precedent I am disinclined to enlarge or expand the principles by which maritime torts are governed.”

In two recent decisions not yet reported the Supreme Court of Erie County, New York, has held directly that the Employers’ Liability Act of New York could not

be held to apply in cases arising out of injuries to employees under maritime contracts of employment.

In

Bach v. Western Transit Co.,

a fireman and member of the crew of the S. S. "Superior" sued to recover for injuries sustained by him during the course of his employment. The Supreme Court of Erie County nonsuited the plaintiff upon the ground that the employment of the plaintiff by the defendant was based upon a maritime contract, and that the state Employers' Liability Act had no application to the facts presented, but that the right of action was governed by the maritime law of the United States.

In

Knapp v. The U. S. Transportation Co.,

the plaintiff was employed as second mate on the defendant's vessel and sued to recover compensation for injuries sustained during his employment. The Supreme Court of Erie County, New York, tried the case upon the theory that the plaintiff's right to recover, if he had such right, was covered by the general maritime law of the United States and not by the New York Employers' Liability Act.

These cases have but recently been called to our attention by Messrs. Goulder, Day, White & Garry, of Cleveland, Ohio, the eminent counsel who briefed the law for the defendant in the Schuede case, supra. We shall take the liberty of furnishing the court and counsel with the citations at a later date.

The learned district judge, in the present case, refused to instruct the jury that the Employers' Liability Act of 1911 did not apply. On the contrary it will be found that he did instruct the jury altogether upon the theory that such act did apply (Tr. fols. 164, 166). Without discussing in detail the differences between the duty of the defendant to the plaintiff under the maritime law and under the Employers' Liability Act of Oregon of 1911, we refer the court to a copy of said act which is printed in an appendix to this brief, and to the maritime law upon the subject of the duties of the employer of a seaman to his employee, as declared in

The Osceola, 189 U. S. 158.

It will be found that the Employers' Liability Act which the court instructed the jury applied to the instant case abolishes the fellow-servant rule, the doctrine of the assumption of risk, and the doctrine of contributory negligence, and imposed safety appliance regulations, the violation of any of which it made to constitute a prima facie case of negligence. The jury was told, for instance, that it should find for the plaintiff if it should find from the evidence that the defendant had violated the provision of the act requiring a system of communications to be established between the stevedores and the operators of the winch upon the vessel.

Barsch's contract is shown to have been a maritime contract. Under the authorities cited, the obligation of Barsch's employer to him should have been measured by the maritime law. Under these authorities

the State of Oregon was without power to enlarge those obligations or to modify the maritime law. The Oregon statute which the trial court used as the basis of its instructions to the jury did away with defenses which the maritime law allowed, and created greater, if not altogether new, obligations upon the part of the employer.

(2) THE "CAMINO" WAS ENGAGED IN INTERSTATE COMMERCE AND THE SAFETY APPLIANCE FEATURES OF THE EMPLOYERS' LIABILITY ACT OF OREGON OF 1911 CANNOT BE APPLIED TO HER WITHOUT VIOLATING THE INTERSTATE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

Section 1 of the Oregon Employers' Liability Act of 1911 constitutes in itself a safety appliance act. We refer the court to the copy of the act set forth in the appendix to this brief where a detailed list of the particular regulations which this section prescribes may be found. Employers are required to make certain inspections and tests of various classes of machinery used in their business; they are required to secure scaffolding, staging and other structure in a particular manner; they are required to cover shafts, wells and floor openings; those using electric wires are required to color the supports or arms bearing live wires so as to distinguish them from supports bearing dead wires; finally, employers are required to see that "all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by

means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power.”

The “Camino” was conceded to have been engaged in interstate commerce. The question therefore arises as to whether or not a vessel engaged in interstate commerce can be subjected to such rigid and minute regulation as to its appliances by the authority of a state statute.

(a) Non-action by the Federal Government will not permit state legislation directly or indirectly affecting interstate commerce in cases which “by their nature” require a uniform rule.

The precise question before the court on this branch of the case is to determine whether or not a state may, without violating the interstate commerce clause of the United States Constitution, bring the instrumentalities of interstate maritime commerce within the scope of a state act containing stringent safety appliance provisions.

In other words, our precise contention is that the matter of safety appliances upon vessels engaged in interstate commerce is one of those matters which “by their nature” require a uniform rule, and is therefore one of those matters over which state legislatures have no control, *even in the absence of direct federal legislation.*

A state may not, of course, legislate *directly* upon any subject of interstate commerce; that is to say, it will be conceded that the State of Oregon could not have passed an act requiring safety appliances to be installed upon interstate carriers with the express view of regulating such carriers.

“If a state enactment imposes a direct burden upon interstate commerce, it must fall, regardless of federal legislation.” (Mr. Justice Hughes in the Minnesota Rate Cases.)

But it is equally well recognized that there is a certain field of action in which the enactments of state legislatures directed solely against intrastate commerce, but necessarily affecting interstate commerce, are upheld *in the absence of express federal enactment*. It is a familiar phrase that where Congress has not seen fit to exercise the federal power to regulate interstate commerce in a given particular, state action indirectly affecting interstate commerce in such a particular is proper.

It is within the exception to this last class of cases that we contend the regulation of safety appliances upon interstate vessels must be classed. That exception is stated as follows by Mr. Justice Hughes in the Minnesota Rate Cases:

Simpson v. Shepard, 230 U. S. 352, 57 L. Ed. 1511, 1541.

“It has been repeatedly declared by this court that *as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive*. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act

within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation.”

This is but a branch of the larger rule laid down by Chief Justice Marshall in the famous case of

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529, p. 548.

“But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it.”

The existence of this exception is developed in the leading cases in which state action was upheld.

In

Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299, 13 L. Ed. 996,

it was held that pilotage, being a matter of more or less local concern, and depending in many particulars upon local conditions, came within the category of those matters which the states might indirectly regulate in the absence of federal legislation upon the subject. But Mr. Justice Curtis, who wrote the opinion of the Supreme Court in that case, recognized that while the matter of pilotage was one of those in which state action was

permissible, there existed a class of cases in which the power of the federal government was exclusive. Thus, he says at page 1005:

“Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; *some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port;* and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.”

A very recent illustration of what has been deemed by the Supreme Court to be a matter “by its nature” demanding federal regulation to the exclusion of the power of the state to regulate it is afforded in the case of

South Covington & C. S. R. Co. v. Covington,
35 Sup. Ct. Rep. 158,

decided January 5, 1915. In that case the City of Covington had sought to regulate in certain particulars the operation of a street railway which connected the City of Covington, in Kentucky, with the City of Cincinnati, in Ohio. It was held by the Supreme Court that the business of the company constituted interstate commerce. The Supreme Court then took up the question as to whether or not the regulations which the ordinance of the City of Covington attempted were such in their very nature as required a uniform federal action, or whether, on the other hand, they were of such a character as to permit local action in the absence of federal legislation. The Supreme Court held that a certain provision of the ordinance which made it unlawful for the company to permit more than one-third

greater in number of passengers to ride in its cars over and above the number for which seats are provided was a matter which by its very nature required exclusive federal control. It was pointed out that if the City of Covington should be permitted to legislate upon this matter, so also would be the City of Cincinnati necessarily be allowed to make a similar regulation, and that the sure result would be a conflict of requirements and an interference with interstate commerce. Mr. Justice Day said as follows upon this phase of the case:

“In the light of the principles settled and declared, the various provisions of this ordinance must be examined. That embodied in sections 1 and 6 makes it unlawful for the company to permit more than one-third greater in number of the passengers to ride or be transported within its cars over and above a number for which seats are provided therein, except this provision shall not apply or be enforced on the Fourth of July, Decoration Day, or Labor Day, and by section 6 it is made the duty of the company operating the cars within the City of Covington to run and operate the same in sufficient numbers at all times to reasonably accommodate the public, within the limits of the ordinance as to the number of passengers permitted to be carried, and the council is authorized to direct the number of cars to be increased sufficiently to accommodate the public if there is a failure in this respect. To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges held by the company, or controlled by it, in that city. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation

of the cars of this company, are to be taken into view in determining the nature of the regulation here attempted, *and whether it so directly burdens interstate commerce as to be beyond the power of the state.* We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall v. De Cuir*, 95 U. S. 485, 489, 24 L. ed. 547, 548, 'commerce cannot flourish in the midst of such embarrassments'.

"We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of federal regulation does not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as do those just considered."

- (b) **The imperative necessity for uniformity prohibits state action in the matter of regulating safety appliances on vessels engaged in interstate commerce.**

It is a short step from the state of facts presented in the *Covington* case, *supra*, to the state of facts pre-

sented in the case at bar. If the State of Oregon can require that all vessels touching at an Oregon port shall have a specified equipment of safety appliances, so also may the State of Washington and the State of California enact that such vessels shall have another and a different set or equipment of such appliances. Thus, it may come about that the owners of vessels, such as the "Camino" may find themselves subjected to terms of imprisonment or heavy fines should their vessels touch at a port in Oregon without first having been equipped with one set of safety appliances, and may again find themselves subjected to fine and imprisonment should their vessels touch at a port in Washington without first having been equipped in an entirely different manner. When we consider that the Oregon act goes so far as to compel the installation of wire supports of a certain designated color, it is apparent that only the greatest confusion and the greatest difficulty must necessarily attend the granting of such power to the various states. In the language of Justice Day, "Commerce cannot flourish in the midst of such embarrassments".

Leaving aside the connection of these regulations with maritime commerce, the very nature of the regulations themselves requires uniformity; but when we consider in addition that these regulations are imposed upon and interwoven with the maritime law, we are again reminded of the strictures of the learned judges who have repeatedly emphasized the necessity for uniformity in all matters associated with that maritime law. We refer to the language employed in the *Workman* case, in the

Lackawana and in the *Chusan*, quoted earlier in this brief, and to the following statement in

Benedict's Admiralty, 4th Ed., p. 412:

“The wisdom of our ancestors, in laying the foundations of the republic, is in nothing more evident than in our organic regulations in relation to commerce. For all commercial purposes we must be one people; no different rules must be applied to our maritime commerce in the ports of the different states; perfect freedom and equality of trade and navigation among ourselves is constitutionally secure. If it had not been so, long before this time we should have been divided, weak and antagonistic nations, the fragments of our original Union. How easy it is to perceive that our harmony might be interrupted, and our strength impaired, if each state might adopt and enforce, on its half of a river, its section of a lake, its short stretch of coast, in its own ports and harbors and local waters, to which all the states have a common right of use, a system of commercial and maritime law, repealing, or conflicting with that great system of commercial law which is known as the admiralty and maritime law, and which alone can secure those equal state rights which it was one great object of the constitution to protect.”

We are now considering not the effect which the Oregon act would have upon the maritime law, if it should be applied so as to destroy the defenses given by the maritime law in actions of this character, namely, the fellow servant rule, the doctrines of assumption of risk and contributory negligence, but the effect which it would have treated solely as a safety appliance act. However, the considerations which in the *Shuede* case, *supra*, led Judge Killits to construe the Ohio Employers' Liability Act as not covering contracts of maritime

employment, while based upon the effect of that act in destroying the defenses above referred to, are worthy of notice in this connection. Judge Killits said:

“In construing a statute, it is the duty of the court to avoid, if it is reasonably possible, that interpretation which works out inequality, inconvenience or absurdity. A construction involving consistency, equality and convenience of those affected, and consonance with the spirit of the law generally, is preferred of a statute, unless the language is plainly an obstacle thereto.

The plaintiff proceeds on the theory that the law of Ohio applies against the Minnesota corporation, and the Ohio jurisdiction attaches in the present case, because the accident happened in an Ohio tributary to the Lakes. There may be some doubt whether it is not the law of the Saxona's home port and the jurisdiction of Minnesota which control, if there is no federal law applying (*Thompson Towing & Wrecking Association v. McGregor*, 207 Fed. 209, 124, C. C. A. 479); but assuming that plaintiff's contention is right, then two consequences follow his construction of the saving clauses in sections 24 and 256 of the Judicial Code, both provocative of inconvenience, inequality, inconsistency and almost absurdity:

First. The defendant, for torts on contract committed by it of precisely the same character and upon servants of precisely the same class, would be subject to as many varieties of responsibility, and would be compelled to vary its defenses as the laws pertaining to the incidents of service differ in the several places of accident. There are eight state jurisdictions bordering upon the waters in which the Saxona plies, and it is conceivable that eight seamen of the same class each might meet in his employment with an injury substantially of the same class in a port of each of such jurisdictions, each claimant enjoying a common right of

recovery under the maritime law or a different right under the local law.

Second. A seaman would enjoy the option of a uniform contractual right under the law maritime, or to vary under local laws the incidents of the contract as he proceeds from port to port and as he had occasion to invoke such rights. In Buffalo his contract would be one thing; in Cleveland, if the Ohio law differs from that of New York, it would have another phase; to change its color again in Detroit, Milwaukee, Duluth, Chicago and Michigan City, if the laws of their several jurisdictions, respectively, offered peculiarities. These conditions with all their inconveniences and inequalities and unnecessary burdens, are not compelled by the language of the saving clause in question, and should be avoided in construing that provision."

It seems to us to need little argument to establish that the enforcement of state regulations as to safety appliances against vessels engaged in interstate commerce would lead to an inevitable burden upon interstate commerce within the direct prohibition of the *Covington* case, and within the prohibition of those cases within which the principal of that case is more broadly stated.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
February 10, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiff in Error.

APPENDIX.

“Employers’ Liability Act of Oregon of 1911.”

(General Laws of Oregon, of 1911, p. 16.)

AN ACT

Providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law.

Be it enacted by the People of the State of Oregon:

Section 1. All owners, contractors, sub-contractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect and defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than twenty feet from the ground or floor shall be secured from swaying and

provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be enclosed, and all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power, and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or sub-contractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for

the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

Section 2. The manager, superintendent, foreman or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee.

Section 3. It shall be the duty of owners, contractors, sub-contractors, foreman architects or other persons having charge of the particular work to see that the requirements of this act are complied with, and for any failure in this respect the person or persons delinquent shall, upon conviction of violating any of the provisions of this act, be fined not less than ten dollars, nor more than one thousand dollars, or imprisoned not less than ten days, nor more than one year, or both, in the discretion of the court, and this shall not affect or lessen the civil liability of such persons as the case may be.

Section 4. If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or sub-contractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded.

Section 5. In all actions brought to recover from an employer for injuries suffered by an employee the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery or appliances; the incompetence or negligence of any person in charge of, or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow-servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

Section 6. The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

Section 7. All acts or parts of acts inconsistent herewith are hereby repealed.

No. 2510

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

SWAYNE & HOYT, INC.,
(a corporation),
Plaintiff in Error,

vs.

GUSTAV BARSCH,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

GILTNER & SEWALL,
Attorneys for Defendant in Error.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Filed

MAR 8 - 1915

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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Plaintiff in error presents in its appeal four assignments of error, numbered from I to IV inclusive, as is indicated by pages 12, 13 and 14 of the Transcript of Record.

However, in the brief of plaintiff in error, but two of said assignments of error are mentioned or discussed. They are Assignment I and Assignment IV.

Therefore, under the rules and practice of this court, as indeed under the rules and practice of

all courts, Assignment II and Assignment III must be deemed waived and abandoned.

Only two points are therefore involved in this appeal. They are the points raised by Assignment I and Assignment IV, and are to the following effect:

(a) That the court erred in refusing to direct a verdict for the defendant.

(b) That the trial court erred in applying the Oregon Employers' Liability Act of 1911.

Before taking up plaintiff in error's Assignments of Error A and B we respectfully submit that these points are not well taken and invite the court's attention to the following points:

The ground of the liability of plaintiff in error is that it was in control of the work of unloading the vessel "Camino" at the time defendant in error was injured. Plaintiff in error is now seeking to raise the point that the undisputed evidence shows that it was not in control of the unloading of this vessel, but that the control of such operation was in the hands of the owner of the vessel, the Western Steam Navigation Company. It is clear upon the face of this record that plaintiff in error is in no position to raise this question. It is well settled that the question of the sufficiency of the evidence

to sustain a verdict can never be raised upon appeal unless such question was raised in the court below by a demurrer to the evidence, or what is equivalent thereto, a motion for a directed verdict.

Western Coal & Min. Co. vs. Ingraham, 70 Fed. 219.

German Ins. Co. vs. Frederick, 58 Fed. 144.

Pacific Mutual Ins. Co. vs. Snowden, 58 Fed. 342.

Drexel vs. True, 74 Fed. 12.

Citizens Bank vs. Fanwell, 63 Fed. 117.

Hartford Ins. Co. vs. Unsell, 144 U. S., 439.

Hansen vs. Boyd, 161 U. S., 397.

It is true that plaintiff in error did, at the close of all the evidence, ask the court to instruct the jury to find in favor of the defendant. The language of this motion is as follows:

“The defendant requested the court to give the following instruction to the jury:

“ ‘The jury is instructed to find for defendant.’ ”

Trans. p. 156.

This motion is insufficient, for the reason that

it does not specify any ground or point out wherein the evidence is insufficient. Indeed, it does not even state that the defendant claims that the evidence is insufficient. The well settled rule relating to motions for directed verdicts is that the defendant in fairness to the court and the opposing party must specify the particular defects in the plaintiff's case. The reason for this rule is obvious. It gives the plaintiff the opportunity of supplying the defects in the proof, and thus prevents his being taken by surprise at a time when it is too late for him to protect himself, namely, after the verdict has been rendered and the jury discharged. As sustaining this rule of practice, see:

United Engineering vs. Broadnex, 136 Fed.
352, 355.

38 Cyc. 1552.

The point was not properly raised by the motion for new trial, as this motion merely states that the evidence was insufficient to justify the verdict. Moreover, it is well settled that the ruling of the trial court in denying a motion for new trial does not present any matter for review on a writ of error to the Circuit Court of Appeals.

United Engineering vs. Broadnex, 136 Fed.

352.

For another reason this court cannot consider the question of the sufficiency of the evidence. The bill of exceptions shows upon its face that it does not contain all of the evidence. On the contrary, the certificate of the trial judge is that it contains substantially all of the evidence offered and received at the trial, with the exception of the evidence as to the extent, nature and character of the plaintiff's injuries and the damages sustained by him.

The case, therefore, comes within the rule of law that the appellate court will always presume in support of the judgment that there was evidence to support it not disclosed by the bill of exceptions, unless the bill of exceptions shows that it contains all of the evidence that was adduced in support of the vital elements of the plaintiff's case.

U. S. Copper Queen C. & M. Co., 185 U. S.
495.

Metropolitan National Bank vs. Jansen, 108
Fed. 572.

But even if the question were properly before the court there would be no ground for reversal.

The evidence is sufficient to sustain the finding that the defendant was in control of the operation of unloading the vessel in question. It is undisputed that the defendant was at the time, and had for some time previous thereto, been the managing agent of the owners of this vessel. These words, "managing agent," are susceptible of a very broad meaning. They tend to establish in and of themselves the fact that the defendant had full charge of all the business operations of the owners of this vessel, connected with the management of such vessel in every conceivable respect. Under such an authority the defendant may have been given power to employ the master and all other persons upon the vessel.

It appears that one C. D. Kennedy, who was called as a witness for the plaintiff, was employed by defendant and was its local agent at Portland, where the vessel was being unloaded at the time plaintiff was injured. Kennedy does not appear to have had any employment from or connection with the Western Steam Navigation Company. Kennedy did not **know** or **act** for Western Steam Navigation Company in the unloading of the Camino. He was employed and paid by Swain & Hoyt and never told Barsch he was working for the

Western Steam Navigation Company.

The following question and answer in his testimony are significant:

“Q. For what purpose were you agent for them?”

A. To act for them here in the capacity of agent in directing the movement of ships that were being run into this port under the Arrow Line.”
(Trans., p. 17.)

He further testified that it was defendant’s money that he paid out in connection with the expenses of unloading this vessel and that he accounted directly to them. (Trans., pp. 16 to 19, and 22 to 27.)

He further testified that Mr. Dosch was employed by him and engaged the longshoremen for most of the ships, and the number of men he needed on the dock. (Trans., p. 19.)

At page 27 he testified in answer to the question by whom he was directed to handle the cargo as follows:

“A. It was understood through the arrangement that I entered into with Swayne & Hoyt, taking the agency there.”

On his re-direct examination his evidence is very clear that the defendant was in charge of the

situation. On page 33 of transcript he testified as follows:

Mr. Dosch, who was employed by Mr. Kennedy, was the man whose business it was to call for the longshoremen when they were needed. The testimony of E. A. Schneider shows that Mr. Dosch called for the longshoremen on this occasion for the Swayne & Hoyt people. (Trans., pp. 40-41.) That he took orders from Kennedy, who was employed by the defendant. (Trans., p. 144.)

Mr. Williams, a witness for defendant, testifies that he was timekeeper on this work and was working for defendant. (Trans., pp. 116-130.) And that Kennedy was the agent of defendant. (Trans., p. 130.)

Plaintiff testified that he was employed by defendant. (Trans., pp. 75-78-79-89 to 91, 95-96.) His evidence discloses admissions by defendant to the effect that it was responsible to him. (Trans., pp. 78 to 82-91-95.)

The testimony of Henry Wolf corroborates that of the plaintiff upon the point that defendant was in charge of this work. (Trans., p. 52.)

The evidence that plaintiff signed a payroll **long after the injury** and employment, which indicated that he was being employed by the owners of

the boat (Trans., p. 25), amounts to nothing. The common working man signs such documents without paying the least attention to their provisions. Plaintiff testified that such was the fact in the case at bar. (Trans., p. 98.)

Indeed the court itself treated such evidence as a mere trifle. (Trans., p. 99.)

Moreover the payroll had stamped upon it the words, "Office of Swayne & Hoyt." (Trans., p. 26.) Swayne & Hoyt's money paid the plaintiff and all the men.

A judgment of non-suit or a directed verdict should never be granted where reasonable minds may draw different conclusions from the facts proved.

Stager vs. Troy Laundry Co., 41 Or. 141.

Sullivan vs. Wakefield, 59 Or. 401-405.

Pacific Biscuit Co. vs. Dagger, 42 Or. 513.

Dillard vs. Ollalla Mining Co., 52 Or. 126.

Nutt vs. Isensee, 60 Or. 395.

RESUME OF TESTIMONY IN THIS CASE.

Mr. Kennedy, who had been agent for Swayne & Hoyt in Portland at the time of the accident, and

who was really an unwilling witness on behalf of the plaintiff, was called and testified as follows:

“On the 31st day of March, 1913, and for eleven months prior thereto, I was local agent at Portland for Swayne & Hoyt, defendants in this case, and had been acting for them for eleven months prior thereto. I was appointed at San Francisco through a verbal agreement with Mr. Swayne and Mr. Moran. Mr. Swayne was president of the defendant company and Mr. Moran was manager of the shipping department. My duties were to act for them in the capacity of agent in directing the movements of ships that were being run into the Port of Portland. It was my duty to pay all bills for the ship, its officers, longshore bills, meat bills and any bills that were contracted by the ship while in port, including the bills of men who helped to load and unload the vessel (pages 16, 17 and 25, Transcript of Record). Swayne & Hoyt had freight on the boat (page 17). Gustav Barsch was employed to work on the Camino on the 31st day of March, 1913. Our office had him on the payroll for Swayne & Hoyt. I accounted to them for the money paid out to those men that were employed in working the ship, and Swayne & Hoyt repaid me. It was their money I was paying out to the men for unloading the ship

(pages 18 and 19.) The manner of employing the men to unload the ship was as follows: I have a man in **our** — on Albers' wharf, Mr. Dosch, and he engages the men from longshoremen hall for most all ships; I would not say for this particular ship; probably he did. It was his custom to learn from the mate or officer on the ship how many men he required for the ship, and Mr. Dosch knew how many men **he** required for the dock end of the work, and summing the two numbers of men together he called to the hall for a certain number of men that were wanted for working the ship, which was sent down and so many men were turned over to the ship and so many men kept on the wharf, and after the ship sailed the account of the longshore wages was made up and sent to our office, and the men called at our office for their money and signed their names for it (pages 19 and 20). I remember Gustav Barsch being injured about the 31st day of March. He reported the matter to me. I gave him a letter to Swayne & Hoyt in San Francisco in regard to this accident (page 20). After his interview with Mr. Moran, in San Francisco, at the instance of Swayne & Hoyt, I took him to a doctor to be examined for his injuries. It was my duty as agent to report any accidents that might occur in the port, and I

reported the accident to Swayne & Hoyt, San Francisco. I did not report the accident to the American Transportation Co. because I did not know them. I never knew them in the transaction. I reported this accident to Swayne & Hoyt before Mr. Barsch went to California (pages 20, 23, 30 and 31). I never told Mr. Barsch that he was working for the Western Steam Navigation Company. There was painted over the bow of the steamship Camino, 'Swayne & Hoyt, Inc., San Francisco, Arrow Line, Managers' (pages 31 and 32). Swayne & Hoyt, on March 31, 1913, were the managing agents of the steamship Camino, with power to direct the movements and operations of the officers and crew of said ship, and said ship, and they directed the movements of the ship. They employed the officers of the ship; the officers usually employed the crew. Swayne & Hoyt were over the officers (page 33). Mr. Dosch represented Swayne & Hoyt in looking after the men for unloading that ship (page 38)."

Mr. Schneider, a witness called on behalf of the plaintiff, testified as follows:

"I was business agent and secretary of the Longshoremen's Union on and prior to the 31st day of March, 1913, with power to make contracts for the longshoremen. I knew Gustav Barsch. I know

the Swayne & Hoyt Co. and the steamship Camino. I made the contract for the men for unloading the steamship Camino. Mr. Dosch telephoned up and said he wanted so many men for the dock and so many men for the ship for the purpose of unloading the steamship Camino for the Swayne & Hoyt people (pages 39, 40 and 41). I signed the payroll for Mr. Wolfe's pay in Mr. Kennedy's office for the Swayne & Hoyt people and turned it over to him. Neither the captain of the vessel nor anyone else paid me any money for the men, except the Swayne & Hoyt people through Mr. Kennedy (pages 48, 50 and 51). Captain Ahlin asked me to go down to the vessel and told me that Swayne & Hoyt people were dissatisfied with the conditions in the Port of Portland (page 49)."

Henry Wolfe testified for the plaintiff as follows:

"I am a longshoreman and belong to the same union as Mr. Barsch belongs to (page 51). I was employed by Swayne & Hoyt to assist in unloading the steamship Camino on March 31, 1913. Swayne & Hoyt Co. paid me for my services through Mr. Kennedy, their agent. Mr. Barsch and I were working together at the time Mr. Barsch was injured (page 52). Mr. Dosch phoned for the men and we

went to Albers' dock No. 3, where the steamer was. Mr. Dosch placed the men in their positions. He sent some on the ship and some on the dock and some he told to sort freight, and he put two and two on it—half to land the loads on the dock and pull them inside the dock, and two or three men to sort that freight. They have to look out for the marks. Swayne & Hoyt had freight on the boat, marked in their name (pages 52 and 53). The winchmen were not able to see us from the position they occupied on the ship while we were working on the dock. We were not notified by anyone to get out of the way before the winchman went ahead with his load (pages 56 and 57). They did not have any signal man there or any system of signalling. The duty of the signal man is to give the winchman orders to go ahead and come back. It is his duty to look out and see that nobody gets hurt. When he sees that everything is safe he tells the boys to look and get out (pages 57 and 58).”

On cross-examination Mr. Wolfe testified:

“Schneider told me, Barsch and the other men to go down on the Albers' dock. He got the order from the foreman on the dock (page 62).”

Mr. Ferguson testified on behalf of the plaintiff as follows:

“I am a longshoreman and acquainted with Gustav Barsch. On March 31, 1913, about half past seven in the evening, I was working on the dock taking loads with Mr. Barsch and Mr. Wolfe at the time Mr. Barsch was hurt. They were working on the dock landing the loads on the truck and I was taking the truck away. Mr. Dosch was foreman over us (pages 68 and 69). The winchmen were unable to see Mr. Barsch and Mr. Wolfe at the time Mr. Barsch was hurt (page 70). They had no signal man there (page 71). There was freight on the boat for Swayne & Hoyt (page 72). No one notified us that the winchman was going ahead with the load (page 72).”

Mr. Barsch, the plaintiff, was called as a witness and testified in his own behalf as follows:

“I am the plaintiff in this case and had business relations with Swayne & Hoyt on or about the 31st day of March, 1913. We were called on in the morning by our business agent. He called for I think it was something over thirty men to go down for Swayne & Hoyt people and work on Albers' dock No. 3 on the steamship Camino. When we went there we were put to work on the dock by Mr. Dosch, the general foreman. He places the men sorting freight and others were trucking and others

were landing the load the same as I. I took general cargo out that day up to about seven o'clock that evening. My partner was Mr. Wolfe. Mr. Ferguson was working there, also. I visited Swayne & Hoyt in San Francisco. I went to Mr. Kennedy here first and he gave me a letter of introduction to Swayne & Hoyt in San Francisco. The offices were located on Sansome street. I went to the office and gave the letter to the chief clerk there. The letter was addressed to Swayne & Hoyt and I gave it to him and he says, 'Wait a minute until Mr. Moran is in here. He is the general manager here and attends to these cases.' I waited until Mr. Moran came and he said to me, 'Are you Mr. Barsch?' I says, 'Yes, I am the man that was working for Swayne & Hoyt people in Portland, unloading the steamship Camino.' 'Yes,' he says, 'I heard about that.' Mr. Moran represented to me that he was the general manager. I says, 'I am the man that was working for Swayne & Hoyt in Portland, unloading the steamship Camino, and I got hurt,' He says, 'I heard about that.' He says, 'How bad were you hurt?' I made a statement to him and he said, 'I am very busy today. Come back in a few days, or day after tomorrow, and I will look into this case.' I came back a few days later, I think

it was about two days later or so. I come back to him about 10 o'clock in the morning and I waited until about 12 o'clock. Mr. Moran did not show up. At 12 o'clock I seen him. I said, 'I am here. I want to get some information from you.' 'Well, yes,' he says, 'I haven't—I have been very busy and I haven't looked into your matter yet, and I will be having it done right away.' Finally he commenced talking. 'I am very busy,' he says again. 'I am very busy today. Can you come back at 10 o'clock tomorrow and I will be at liberty to attend to your case for you, and will go to our lawyer and **settle our case.**' I came back the next morning at 10 o'clock. I waited until 3 o'clock in the afternoon. I asked the clerk, 'Has Mr. Moran been here?' The clerk said, 'No, I haven't seen him.' I got rather angry. I went out and says to the clerk, 'I am going back to Portland tonight and take such action as I see fit,' and I went out the office door and I was not gone more than twenty steps when out comes Mr. Moran and hails me and says, 'Come back here.' I went back to him and he says, 'Now you are the man.' 'Yes,' I say, 'I am Mr. Barsch.' 'I am Mr. Moran,' he says. 'Yes, I know all about that.' He says, 'I will give you a letter, I will send you up to our lawyer who settles all our cases for

us'; and he sent me up to Mr. Campbell, the lawyer. I went up and stated the case. I came back again to see Mr. Campbell. I came back to Portland and came up to Mr. Kennedy's office, and Mr. Kennedy said, 'Here, come in my automobile, and we will go up to the doctor. I got notice from San Francisco to take you to the doctor here in Portland.' And we went to a doctor. Dr. Hamilton examined me. (Pages 75, 78, 79, 80 and 81.) I went back to Mr. Kennedy's office four or five times. Mr. Kennedy said to me he was going to send a night letter right away that night to Swayne & Hoyt, San Francisco, and he waited an answer, and he told me to come back in a day or two and he would surely have an answer. We were trying to make a settlement. Mr. Dosch was the foreman over us. We took orders from him. (Pages 82 and 83.) No one gave us any notice that the winch driver was going ahead with this load that struck me. They had no signal man there at the time I was injured to give signals. It is customary in loading and unloading cargoes from vessels in this port, where winchman is not able or not in position to see the men working on the dock or in the hold, to have a signal man to signal between them (pages 85 and 86). Mr. Kennedy told me that I was working for Swayne & Hoyt

(page 91). The Swayne & Hoyt people in San Francisco acknowledged that I was working for them when I got hurt (page 95). This is my signature on Exhibit 'A,' Voyage No. 12. The signature is right but the pay is not right. I never took any pay at all from that steamer. I didn't take the pay from that steamer until ten weeks after that payroll. I signed that payroll about three weeks after the accident so they could forward it to San Francisco. I signed it under protest. I said, 'I don't know why I signed here for and how it is coming out.' I said, 'I'm hurt and I don't know how it will come out, whether I sign this or whether I got a right to sign this or not, so I don't sign it.' But the clerk told me; he says, 'This payroll has got to go to San Francisco, got to go to Swayne & Hoyt in San Francisco, and we can't send it off,' and he says, 'You are the only one not signed,' so under protest I signed it but didn't take the money. I never read it over; the clerk told me it was the payroll. (Pages 100, 101.)

Q. So you knew from what the clerk told you you were working for the steamer?

A. No. Didn't say we were working for the steamer. Was unloading for Swayne & Hoyt as much as I understand.

Q. Did the clerk tell you you were working for Swayne & Hoyt?

A. It is their steamer.

Court: I suppose it is the same as in every office. They pass out the payroll and say 'Sign it' and they never look (page 99).

I never heard of the Western Steam Navigation Company or that they were the owners of the ship. I never heard that I was working for the Western Steam Navigation Company; neither did Swayne & Hoyt or Mr. Kennedy ever tell me that I was working for the Western Steam Navigation Company. Mr. Dosch put me to work on the dock. He assigned the longshoremen their respective positions here."

Mr. Williams, a witness called on behalf of the defendant, testified as follows:

"On or about the 31st day of March, 1913, I was working for two companies—I was working for the American-Hawaiian Steamship Co. and also was working for Swayne & Hoyt. In working for the American-Hawaiian Steamship Co. I was receiving clerk, and working for Swayne & Hoyt I was timekeeper, or assistant supercargo or foreman.

Q. Now, when you were keeping time there at the time of this accident you say you were in the

employ of Swayne & Hoyt and also of the American-Hawaiian Steamship Co.?

A. No, I didn't say that. I said when I was working for the American-Hawaiian I was working as receiving clerk, and when I was keeping time I was working for Swayne & Hoyt.

Q. Well, at the time you were keeping time for these men you were working for Swayne & Hoyt, were you not?

A. Yes, sir.

Q. You were paid through Mr. Kennedy?

A. I was paid through Mr. Kennedy. I was paid by his payrolls as the longshoremen.

Q. He was the agent of Swayne & Hoyt, wasn't he?

A. He was the agent.

Q. Then you understood you were working for Swayne & Hoyt; you were getting your pay from Swayne & Hoyt, weren't you?

A. I was not getting my pay direct from Swayne & Hoyt. I was getting it from Mr. Kennedy. (Pages 115-130.)"

E. P. Dosch, the dock foreman, a witness called on behalf of the defendant, testified as follows:

"Q. Very well, then, I will try to state definitely. Can you recollect the procedure you went

through in securing men to come down to the wharf to work on the steamship Camino about the 31st day of March, 1913?

A. Well, we always used just one system, that is, if we want longshoremen; when ordered to get longshoremen or need them myself, I usually telephone or call at the house and get hold of the business agent of the union, and tell him I want so many men to work such and such a boat at such and such an hour, whatever it may be.

Q. What is your best recollection of the 31st day of March, 1913? Did you employ men for Swayne & Hoyt that day?

A. Well, I couldn't say, because I never do use any name at all; never even use American-Hawaiian Steamship Co. when I order men. Merely call for the men and say that I want 30 men at 7 o'clock at such and such a dock for such and such a steamer, whether the Camino, the Navajo or the Praiso, whatever ship wants men. (Pages 135 and 136.)"

Mr. Hoyt, the vice-president of the defendant company, testified that the Western Steam Navigation Company was the owner and was engaged in unloading the steamship through its agent, and that its agent was C. D. Kennedy, and that Kennedy was responsible for the unloading of the steamship

(pages 150 and 151).

C. D. Kennedy testified (on page 31) that he never heard of the Western Steam Navigation Company and never knew them in the transaction, and was not employed by them but that he was working for Swayne & Hoyt (page 16). This shows that C. D. Kennedy, the agent at Portland, Oregon, was the one who had charge of the unloading of the vessel and who was responsible for the unloading of the vessel according to the defendant's own testimony. The question then to determine is, "Who was C. D. Kennedy agent for?" Mr. Kennedy, in his examination, states that he was agent for Swayne & Hoyt, and not for the Western Steam Navigation Company, and that he never knew the Western Steam Navigation Company; so that if C. D. Kennedy was the agent, as he says, for Swayne & Hoyt, and if he as agent, as testified to by John G. Hoyt, the vice-president of the company, was engaged in and had charge of the unloading of the steamship and assumed the responsibility for the work of unloading the steamship, then he must have acted for Swayne & Hoyt, and his act was the act of Swayne & Hoyt, showing that Swayne & Hoyt had the control and were unloading the boat through him. This question was the question at

issue, was submitted to the jury, and the jury found that Swayne & Hoyt, through their agent Kennedy, were unloading the boat.

Mr. Hoyt further testified on behalf of the defendant in answer to the following questions: "Is it not a fact that on and prior to March 31, 1913, the defendant Swayne & Hoyt, Inc., was the managing agent of the steamship Camino, with power of directing the movements and operations of the officers and crew of said ship and of said ship?" to which the witness answered, "Yes."

The evidence further shows that the witnesses: Messrs. Swayne, president; Hoyt, vice-president, and Moran, manager, of Swayne & Hoyt, all testified that Swayne & Hoyt, Inc., had no contract in writing with the owners of the steamship Camino containing the terms of agreement showing the relationship, the pay they were to receive, and their power and duties, as managers, with the Western Steam Navigation Company, the alleged owners.

There is no evidence that the steamship Camino was engaged in interstate commerce. We believe that the foregoing testimony conclusively shows that Swayne & Hoyt, through its agent Kennedy, was in control of the men who were unloading the boat and was actually unloading the boat for itself.

It employed the men through Kennedy and Dosch to work for Swayne & Hoyt in unloading the boat. Dosch was a sub-agent of defendant, foreman over the men, assigned them their positions to do the work and gave them orders. Having placed them to work, and with apparent power to so do, it looks like he had the power to place a signal man on the dock with a whistle to notify the winchmen, by one whistle to go ahead with the load, or two whistles to stop or let go. It does not appear by the testimony of either the captain or mate that they had control of the unloading, or assigned the men their positions, or that they were in the employ of any other firm or corporation than Swayne & Hoyt. If their testimony had been given, it would show that they were working for and paid by Swayne & Hoyt. Why the defendant did not offer their testimony is only known to defendant itself. Then another strong fact, which shows that the defendants were in control and unloading the boat, is that Swayne & Hoyt paid the men, including plaintiff, with its own money; sent the plaintiff to a doctor, to be examined as to his injuries, and tried to settle the case by sending him to its lawyer, Mr. Campbell. It did not deny its liability. Barsch's conversation with Moran took place before the deposition of Mr.

Moran was taken and he never referred to or denied the testimony of Mr. Barsch. Mr. Williams, defendant's witness, testified that he was working as timekeeper for Swain & Hoyt.

For another reason the defendant is liable. It is an elementary rule of law that an agent may render himself liable as principal upon a contract by failing to disclose his agency. And he cannot escape liability by disclosing the fact that he **is acting as agent**, but he must go further and **clearly indicate the principal** for whom he is acting.

31 Cyc., 1553 to 1558, and cases cited.

It is true that this action is for a tort, but the tort grows out of a breach of duty which is created by one of the implied terms of a contract of employment. In 1 Labatt Master and Servant, Sec. 6, it is said:

“It is well settled that the duties of the master to his servant arise out of the contract of employment and are limited to those obligations which under that contract he has impliedly agreed to perform.”

It is therefore obvious that this rule of law that the agent is liable as principal unless he clearly discloses the name of his principal, applies to every feature of the contract of employment. Not only

does it render the agent liable as principal for the wages to be paid the servant, but it also renders him liable as master for all the implied obligations created by the contract of employment. In other words, for all the purposes of the contract he is the master, not only for the purposes of liability, for compensation, for wages, but also for the purposes of liability, for compensation to the servant for breach of the implied obligation to furnish a safe place to work and safe instrumentalities, etc. **In such a case the question is not whether the agent is in fact in control of the work**, because under such circumstances **another principle** comes into play, and this is the principle of estoppel. The party who has in law held himself out as master and therefore as in control of the work, will, so far as the servant is concerned, be deemed to be in control of the work. And this is an eminently **just principle**. Any other rule of law would place the servant in the following position: He would go to work for A, knowing him to be financially responsible for injuries, and then after he has been injured he would discover that he has a worthless claim for damages against B, who is in fact the principal in the transaction. If A, the agent, desires to relieve himself of this responsibility, he has the simple

means in his power of doing so by informing the servant that he, A, is not the master, but is in fact acting as agent for B.

In the case at bar the defendant held itself out as being in control of the work of unloading the vessel in various ways. But the most conspicuous and conclusive representation of this kind for which it is responsible is the fact that on the bow of the boat was painted the words: "Swayne & Hoyt Company, Managers." Does the word "Manager" indicate to the public who the real principals are? It certainly does not. It does not indicate that the defendant was acting for the owners of the boat, nor does it indicate that they were acting for a charterer of the boat. The plaintiff as servant was not in this or any other way notified of the crucial point as to who was actually engaged in the business of unloading this boat aside from the defendant itself. He was employed for this special purpose and had no interest in the question, who was the owner or the charterer, but merely in the question, who was doing the work of unloading this vessel. And everything indicated to him, as a plain man of common understanding, that he was dealing exclusively with the defendant.

The trouble with the authorities cited by plain-

tiff in error on this point is that in those cases the agent assumed to deal as agent for the owners of the vessel, but here the defendant did not represent to plaintiff that in hiring him to help unload this vessel, it was acting exclusively as agent for the owners of the vessel. On the contrary, it represented to him that it was manager in control of the whole situation. And even if the word "Manager" contained a hint that someone else might be engaged in this work it did not point out the particular person the defendant was manager for.

It is well settled that nothing short of actual knowledge of the identity of the principal will relieve the agent from liability.

Robbins vs. Phelps, 5 Minn. 463.

Cobb vs. Knapp, 71 N. Y. 348.

Mahoney vs. Kent, 28 N. Y. Supp. 19.

Kneeland vs. Coatsworth, 9 N. Y. Supp. 416.

Book vs. Jones, 98 S. W. 891.

Indeed there is very eminent authority for the proposition that the defendant is liable even though it was engaged in unloading this vessel as managing agent for the owners, and the plaintiff knew this to be the fact. In the last analysis the

question of liability is always a question of **control**, and the duties and powers of a managing agent may be such that he is as much in control of the work as the principal would be if he were personally present. In such cases when the principal turns over the entire work to the managing agent, giving him unlimited power and discretion in the matter, the managing agent is the principal and responsible as such. Indeed this is a rule founded on sound policy, because it obviates the necessity of two actions. Undoubtedly the principal can always fall back upon the managing agent for indemnity in case the principal is held liable to the servant; and the result is that, at the end of two lawsuits, the managing agent has been required to pay the damages for his improper management of the business. This rule which renders the managing agent under such circumstances directly liable to the servant works no injustice to the managing agent, and accomplishes in one lawsuit what would otherwise take two lawsuits to accomplish. There is an especial reason for applying this doctrine to the case of vessels coming into port and sailing away again where the owner is a foreign corporation and cannot be served with process in the state where the injury happens. This question is exhaustively discussed

by the court in

Tippecanoe Loan & Trust Co. vs. Jester, 101
N. E. 915.

In this case the managing agent of a building was held liable for an injury sustained by a defect in an elevator, the allegation of the complaint being that such agent had full charge and complete control of the management and operation of the business.

No one quotation from the opinion in this case will do justice to the exhaustive discussion of it, and we, therefore, earnestly request the court to read the entire opinion so far as relates to this point.

See pp. 916, 920.

THE TRIAL COURT DID NOT ERR IN
APPLYING THE OREGON EMPLOYERS' LIA-
BILITY ACT OF 1911.

We wish in this connection first to call the court's attention to the fact that the question as to whether or not the trial court erred in applying the Employers' Liability Act of Oregon is not properly before the court for review. This question is attempted to be raised by virtue of the fourth assignment of error, which said assignment is entirely

without foundation in the record. This assignment is directed to an alleged error of the court in charging the jury. But when we turn to the bill of exceptions we find that no portion whatever of the charge was excepted to. It therefore stands as the conceded law of the case, from the acquiescence of the plaintiff in error, that that portion of the charge embraced in this assignment of error correctly states the law.

But assuming that this assignment is properly before the court for review, our argument on this point will take the following course:

1. THE PLAINTIFF WAS INJURED WHILE HE WAS WORKING UPON THE DOCK AT PORTLAND, IN THE STATE OF OREGON. ADMIRALTY HAS NO JURISDICTION OVER A TORT CONSUMMATED UPON LAND AND AWAY FROM NAVIGABLE WATERS; BUT THE LAW OF OREGON FIXES THE RIGHTS OF THE PARTIES.

(a) Admiralty has jurisdiction of maritime torts only.

(b) The jurisdiction of courts of Admiralty, in matters of contract, depends upon the nature and character of the contract; but in tort, it depends entirely upon locality.

(c) Personal injuries received on shore, although caused by negligence originating on a ship, are not within the jurisdiction of Admiralty.

(d) The law in force where the injury happens fixes the rights of the parties, and if this law is statutory rather than common law, the statute must be followed.

2. THE "CAMINO" WAS NOT ENGAGED IN INTERSTATE COMMERCE, BUT ASSUMING THAT SHE WAS SO ENGAGED, SHE WOULD NEVERTHELESS BE SUBJECT TO THE OREGON EMPLOYERS' LIABILITY ACT OF 1911, AT LEAST IN SO FAR AS THAT ACT REQUIRES A SYSTEM OF COMMUNICATION BY MEANS OF SIGNALS, FOR THE SAFETY OF EMPLOYEES AND THE PUBLIC.

(a) States have a right to legislate on all subjects relating to the health, life and safety of their citizens, even though such legislation might indirectly affect foreign or inter-commerce.

(b) Wherever there is any business in a state, in which, from the instrumentalities used, there is danger to life or property, it is the plain duty of the state to make provision against accidents likely to follow in such business, so that the dangers attending it, may be guarded against so far as it is

practicable; and such enactments will be sustained even if interstate commerce is thereby indirectly affected.

(c) Where a state statute contains several provisions, some of which attempt to regulate interstate commerce, and others which do not, the provisions are separable, and while the first part may be void as a regulation of interstate commerce, it will not affect the validity of the remaining provisions of the statute.

(d) A person claiming that a state statute violates the Federal Constitution must bring himself, by proper averments and showing, within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates to deprive him of rights protected by the Federal Constitution.

1. THE PLAINTIFF WAS INJURED WHILE HE WAS WORKING UPON THE DOCK AT PORTLAND, IN THE STATE OF OREGON. ADMIRALTY HAS NO JURISDICTION OVER A TORT CONSUMMATED UPON LAND AND AWAY FROM NAVIGABLE WATERS; BUT THE LAW OF OREGON FIXES THE RIGHTS OF THE PARTIES.

(a) Admiralty has jurisdiction of maritime torts only.

We do not dispute the claim advanced by plaintiff in error, in its brief, that a stevedore's employment is a maritime contract, and that such a contract would be governed by the Admiralty or Maritime law. No issue can possibly arise in this case about a maritime contract, for the reason that the plaintiff below did not bring action on a maritime contract, or seek to enforce any rights growing out of a maritime contract. He commenced an action for personal injuries sustained by him, which injuries grew out of the commission of a non-maritime tort. A reference to the complaint and testimony and also to the brief of plaintiff in error will disclose that, at the time of the injury complained of, Barsch was standing on the dock, and was in the act of releasing the sling from an iron beam which had been raised from the hold of the vessel and deposited on the dock, when the winch driver started up the engine before Barsch had completed his operations, with the result that one end of the beam was suddenly lifted, and struck Barsch. Barsch, during all this time, was not standing on the vessel or on the waters, but was standing and working on the dock, and his injuries were con-

summated on the dock.

In the case of *Thomas vs. Lane*, 2 Sumn. 9, Mr. Justice Story observed that

“In regard to torts, I have always understood that the jurisdiction of Admiralty is exclusively dependent upon the locality of the act. The Admiralty has not, and never, I believe, deliberately claimed to have, any jurisdiction over torts, except such as are maritime torts.”

This rule has been repeatedly followed, without exception, by the Supreme Court; the last time in an opinion by Mr. Justice Hughes, in the case of *Atlantic Transport Co. vs. Imbrovek*, 234 U. S. 52, decided in 1914.

See also

The Plymouth, 3 Wall. 20;

Philadelphia, etc., vs. Philadelphia, etc., 23 How. 209;

Johnson vs. Elevator Co., 119 U. S. 388,
and the authorities cited by Mr. Justice Hughes in *Atlantic Transport Co. vs. Imbrovek supra*.

(b) The jurisdiction of courts of Admiralty, in matters of contract, depends upon the nature and character of the contract; but in tort, it depends

entirely on locality.

According to the rule laid down by the Supreme Court, Admiralty has no jurisdiction of a tort unless the substance and consummation of the wrong took place on navigable water. Where the consummation of the wrong occurs on the land, Admiralty has no jurisdiction.

In the case of

The Plymouth, *supra*,

a vessel caught fire, owing to the negligence of its officers and crew, and by reason of the fact that the vessel was tied to a wharf, the fire spread to the wharf and it was destroyed. The owners of the wharf filed a libel in Admiralty against the owners of the vessel to recover damages therefor. The court held Admiralty had no jurisdiction because the consummation of the injury occurred on land.

To the same effect, see

Atlantic Transport Co. vs. Imbrovek, *supra*.

Philadelphia, etc., vs. Philadelphia, etc.,
supra.

(c) Personal injuries received on shore, although caused by negligence originating on a ship, are not within the jurisdiction of Admiralty.

The Plymouth, *supra*.

Atlantic Transport Co. vs. Imbrovek, *supra*.

Price vs. The Belle of the Coast, 66 Fed. 62.

The H. S. Pickands, 42 Fed. 239.

(d) The law in force where the injury happens fixes the rights of the parties, and if this law is statutory rather than common law, the statute must be followed.

We believe that we have completely demonstrated that the present case is not one of Admiralty cognizance, and not being such a case as is governed by the Admiralty rules, the question is presented as to what law is applicable.

The Supreme Court has long since established the rule to be that the law in force where the injury happens fixes the rights of the parties.

See

N. P. Ry. Co. vs. Babcock, 154 U. S. 190.

Stewart vs. B. & O. Ry., 168 U. S. 445.

See also

The "BEE," 216 Fed. 709.

The injury here complained of was consummated on Oregon soil, away from navigable waters, and therefore the law of Oregon governs the case. The complaint sets forth a state of facts which necessarily brings the action within the Oregon Employ-

ers' Liability Act, and the tort being non-maritime, and the Liability Act being in force in Oregon at the time of the injury, that is the law which governs the case, and which fixes the rights and liabilities of the parties.

The cases cited by the plaintiff in error in its brief, such as

Schuede vs. The Zenith S. S. Co., 216 Fed.

566; and

The Henry B. Smith, 195 Fed. 312,

are cases involving strictly maritime torts, which come within the Admiralty jurisdiction, and therefore have no application in the case at bar.

2. THE "CAMINO" WAS NOT ENGAGED IN INTERSTATE COMMERCE, BUT, ASSUMING THAT SHE WAS SO ENGAGED, SHE WOULD NEVERTHELESS BE SUBJECT TO THE OREGON EMPLOYERS' LIABILITY ACT OF 1911, AT LEAST IN SO FAR AS THAT ACT REQUIRES A SYSTEM OF COMMUNICATION BY MEANS OF SIGNALS, FOR THE SAFETY OF THE EMPLOYEES AND THE PUBLIC.

Counsel for plaintiff in error says, in his brief, that it was conceded that the "Camino" was engaged in interstate commerce. We do not see

where he obtains authority for his statement, and we challenge the assertion. Nowhere in the record, either in the complaint, answer, reply or the testimony does it appear either directly or by legitimate inference that the "Camino" was engaged in interstate commerce. Certainly the fact that her owners resided, or had their place of business in San Francisco, does not prove that the vessel was engaged in interstate commerce.

But, passing that point by, we will assume, for the purpose of the argument, that the record discloses that the "Camino" was engaged in interstate commerce.

(a) States have a right to legislate on all subjects relating to the health, life and safety of their citizens, even though such legislation might indirectly affect foreign or interstate commerce.

In the case of *Southern Railway Co. vs. King*, 217 U. S. 524, the court, speaking through Mr. Justice Day, said:

"It has been frequently decided in this court that the right to regulate interstate commerce is, by virtue of the Federal Constitution, exclusively vested in the Congress of the United States. The state cannot pass any law directly regulating such commerce. Attempts

to do so have been declared unconstitutional in many instances, and the exclusive power in Congress to regulate such commerce uniformly maintained. While this is true, the right of the states to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the state, in the interest of public health and safety, have been maintained by the decisions of this court.”

In *Crutcher vs. Kentucky*, 141 U. S. 47, the court said:

“It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves, and generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations effect, to some extent, the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of Congressional regulations over the same subject, are free from all constitutional

objections, and unquestionably valid.”

Again in the case of *The James Gray vs. The John Fraser*, 62 U. S. 184, the Port of Charleston, by ordinance, enacted a law that all vessels anchored in the harbor keep a light burning on board from dark until daylight, suspended conspicuously midships, twenty feet high from the deck. A vessel, engaged in foreign commerce, used a different sort of light from the one prescribed by the ordinance, and a collision occurred.

It was urged that the city had no power to make such a regulation, on the ground that it constituted an interference with foreign commerce and violated the Federal Constitution.

The court, speaking through Mr. Chief Justice Taney, answered this objection by remarking that:

“Regulations of this kind are necessary and indispensable in every commercial port for the convenience and safety of commerce. And the local authorities have a right to prescribe * * * what description of light a vessel shall display to warn passing vessels of her position. Such regulations are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them and to conform to

them. And there is nothing in the regulations referred to in the Port of Charleston which is in conflict with any laws of Congress regulating commerce, or with the general Admiralty jurisdiction conferred on the courts of the United States.”

A similar question was presented in *Hennington vs. Georgia*, 163 U. S. 299, where the court held that:

“It is clear that legislative enactments of the states passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce, and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union, until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the constitution. Local laws of the character mentioned have their source in the powers which

the states reserved and never surrendered to Congress, of providing for the public morals, and the public safety, and are not, within the meaning of the constitution, and considered in their own nature, regulations of interstate commerce, simply because, for a limited time, or to a limited extent, they cover the field occupied by those engaged in such commerce.”

(b) Wherever there is any business in a state, in which, from the instrumentalities used, there is danger to life or property, it is the duty of the state to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as it is practicable; and such enactments will be sustained, even if interstate commerce is thereby indirectly affected.

This is the rule laid down in the case of *Nashville Ry. vs. Alabama*, 128, U. S. 96.

To the same effect see

Sherlock vs. Alling, 93 U. S. 99.

Chicago vs. Solan, 169 U. S. 133.

Simpson vs. Shepard, 230 U. S. 352.

The United States Supreme Court in *Simpson vs. Shepard*, 230 U. S. 352, has settled this point. In this case the court said:

“But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede. Further it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or directly be involved. Our system of government is a practical adjust-

ment by which the national authority as conferred by the constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to the care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitution system has thus been made possible. * * *

“Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits.

Chicago, M. & St. P. R. Co. vs. Solan, 169 U. S. 133, 137, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. vs. Hughes, 191 U. S. 477, 491, 48 L. ed. 268, 273, Sup. Ct. Rep. 132; Martin vs. Pittsburg & L. E. R. Co., 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Southern P. R. Co. vs. Schuyler, 227 U. S. 601, 613, ante, 662, 669, 33 Sup. Ct. Rep. 277. Until the enactment by Congress of the act of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322, the laws of the states determined the liability of interstate carriers by railroad for injuries received by their employes while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon. In some states the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and in other matters specified in the statute, to establish a uniform rule. Second Employers' Liability Cases (Mondou vs. New York N. H. & H. R. Co.), 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169; Michigan C. R. Co. vs. Vreeland, 227 U. S. 59, 66, 67, ante,

417, 419, 420, 33 Sup. Ct. Rep. 192.”

The tort in question was not a maritime tort as it was consummated on the land; and therefore in determining whether the facts create a liability we must look to the laws of the State of Oregon and not to the maritime law.

Johnson vs. Chicago & El. Co., 119 U. S. 388.

The John C. Sweeny, 55 Fed. 540.

1 Cyc., 843, and cases cited.

The Arkansas, 17 Fed. 383.

The Supreme Court of Oregon and the United States District Court for the District of Oregon have held the Employers' Liability Law in question applicable to a case of this kind.

Gynther vs. Brown & McCabe, 134 Pac. 1186.

The Bee, 216 Fed. 709.

In the present case, the plaintiff in error protests against the Oregon Employers' Liability Act, and says that because it requires all employers using dangerous machinery, other than machinery driven by hand power, to install a system of communication by means of signals, where the safety of the employees and the public requires it, the act

amounts to a regulation of interstate commerce.

The statute in question was enacted by the State of Oregon in pursuance of the police power, which includes the safety of the life and limb of its citizens, and the state had the right to make such a law to safeguard the life and limb of its people. The act applies to all persons in the state engaged in the occupations specified and operates on all alike. It does not single out employers engaged in interstate commerce, but applies equally to all persons, whether engaged in interstate commerce, intrastate commerce, or any business whatsoever. The act does not attempt to regulate interstate commerce, and only indirectly and to a very slight degree indeed can it be said to interfere with interstate commerce.

This case is wholly unlike the cases cited by plaintiff in error, and is readily distinguishable from *South Covington Ry. vs. Covington*, 36 Sup. Ct. Rep. 158, mentioned in the brief of plaintiff in error, and on which great reliance is placed.

The ordinance of the City of Covington in the latter case, in so far as it declared the number of passengers that might ride on a car in Covington, amounted to a direct interference with interstate commerce with respect to cars passing be-

tween Covington, in the State of Kentucky, and Cincinnati, in the State of Ohio, for if Cincinnati should establish a different regulation, and should set the number of persons who might ride on such cars at a different figure from that established by Covington, it would be absolutely impossible for both laws to be observed.

But, in our present case, no such complicated situation could arise. It is entirely possible for a vessel calling at an Oregon port to use a system of signals while in Oregon, and it likewise is possible to use a similar or even a different system of signals in California and Washington, or to make use of no system of signals at all, if none is required in other states. The Oregon law does not even attempt to say what sort of a signal system shall be used. All that it requires is that the system shall provide prompt and efficient communication. One man blowing a whistle is quite sufficient to satisfy the requirements of the Oregon Employers' Liability Act. The observance of the Oregon law does not render it impossible to observe the laws of other states.

We note that counsel for plaintiff in error, in his brief, speaks of the Oregon Liability Act as a safety appliance act, and in his argument, treats it

as such, and says it would be impossible for a vessel to comply with all the minute regulations and safety appliances required.

We desire here to call the attention of the court to the fact that the entire act was not applied in this case, as a reading of the trial court's instructions to the jury will disclose; but only that part which requires a signal system to provide means of communication where dangerous machinery, not driven by hand power, is used. The only question that can arise on this appeal with reference to the Oregon Employers' Liability Act is whether the act is invalid in so far as it requires persons in charge of a vessel to install a system of communication by means of signals, where in the process of unloading, on shore, dangerous steam-driven machinery is used. We believe that the authorities which we have heretofore cited in this brief abundantly prove that the signal system feature of the act is valid and constitutional, and should be sustained as a valid exercise by the State of Oregon of its police power. Vessels used as interstate carriers, were held to come within the purview of the act by the Supreme Court of Oregon in the case of *Gynther vs. Brown & McCabe*, 67 Ore. 310, and by U. S. District Court of Oregon in the case of "*The Bee*," 216 Fed. 709.

(c) Where a state statute contains several provisions, some of which attempt to regulate interstate commerce and others which do not, the provisions are separable, and while the first part may be void as a regulation of interstate commerce, it will not affect the validity of the remaining provisions of the statute.

The above rule is laid down by the Supreme Court in the recent case of *So. Covington Ry. vs. Covington*, supra. So that, even if that portion of the Oregon Employers' Liability Act which requires the installation of certain safety appliances can be considered as a regulation of interstate commerce under any circumstances, it could not have the effect of vitiating that section of the act which requires a system of signals, which section is manifestly not a regulation of or an interference with interstate commerce.

(d) A person claiming that a state statute violates the Federal Constitution must bring himself, by proper averments and showing, within the class as to whom the act attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates to deprive him of his rights protected by the Federal Constitution.

Swayne & Hoyt, who now urge that the Oregon Employers' Liability Act violates the Federal Constitution, for the reason, so they say, that it is a regulation of interstate commerce, are in no position to attack the law now. It is not averred in their answer or in any pleading that the "Camino" was engaged in interstate commerce. Neither was there any showing of any kind, either in the testimony or pleadings, that the "Camino" was an interstate carrier. Likewise, Swayne & Hoyt made no effort at showing in what manner, if at all, the act injured them or operated to deprive them of any rights guaranteed to them by the Constitution of the United States.

Under the ruling of the Supreme Court, in the case of *Southern Ry. vs. King*, supra, Swayne & Hoyt will not now be heard to say that the act is unconstitutional.

Mr. Justice Day, in the course of the opinion in the last mentioned case, observed that

"It is the settled law of the court that one who would strike down a state statute, as violative of the Federal Constitution must bring himself, by proper averments and showing, within the class, as to whom the act thus attacked is unconstitutional. He must show that

the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of his rights protected by the Federal Constitution.”

It is urged that plaintiff's injuries were caused by the negligence of the winchman and that he was the employee of the owners of the vessel and not of the defendant, and that, therefore, defendant is not responsible.

In answer to this, we insist that the defendant was in charge of the entire work of unloading the vessel and that all the persons concerned therein were its servants, the foreman being its agent under the Employers' Liability Law of Oregon. But even if we assume that the defendant had no control over the winchman and is in no manner responsible for his carelessness, the case would not be different. Under the Employers' Liability Law it was the duty of the defendant to provide a system of communication by means of signals so that the winchman would not start the engine until the proper time when it could be safely done. Whatever the facts might be, this duty would remain an absolute duty. If this duty had been discharged and in spite of a proper signal being given the winchman had negligently disregarded it, a differ-

ent question would be presented. In such a case the proximate cause of the plaintiff's injuries would be, not the failure of the defendant to provide a proper means of communication by signals, but the disregard of the signals by the servant of another master. Such, however, is not the case at bar. The case shows that the winchman started the engine at the wrong time, because of the fact that there was not proper means of communication between him and the plaintiff furnished, as required by the statute. That this statutory duty rested absolutely upon the defendant must be taken to be the law of this case, for the court so charged the jury and no exception was taken to such charge. Even if we assume that defendant would have had no right to place any one on the vessel to give the proper signal, this would in no manner lessen the statutory obligation of the defendant to protect its servants by establishing a proper communication between him and the winchman in some other feasible way on the wharf. But, of course, it is absurd to argue that there was the slightest obstacle in the way of this defendant (whose word would, in this respect, be absolutely controlling with the mate of the ship) in placing on the vessel or any where else the necessary person to establish communica-

tion between the plaintiff and the winchman. The argument of defendant's counsel that when two masters are engaged in a common work, neither is responsible for the carelessness of the servants of the other, has not the slightest relevancy to this case, for the proximate cause of the plaintiff's injuries was not the carelessness of the winchman, but the neglect of the defendant in failing to discharge its absolute statutory duty to the plaintiff of furnishing the necessary means of communication to safeguard him against peril.

See in this connection the language of the court in *Gynther vs. Brown & McCabe*, 134 Pac. 1186, at page 1189.

We respectfully submit that the judgment should be sustained.

GILTNER & SEWALL,
Attorneys for Defendant in Error.

No. 2510

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWAYNE & HOYT, INC.

(a corporation),

Plaintiff in Error,

vs.

GUSTAV BARSCH,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

IRA A. CAMPBELL,

SNOW & McCAMANT,

Attorneys for Plaintiff in Error.

Filed this _____ day of April, 1915.

FRANK D. MONCKTON, Clerk.

By _____ Deputy Clerk.

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Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

This brief is intended to cover certain points raised by the defendant in error in his brief and upon the oral argument.

The First Branch of the Case.—Swayne & Hoyt, Inc., Merely Managing Agent for the Western Steam Navigation Company, Owner of the “Camino” and Therefore Not Liable to Barsch.—Reply to Defendant In Error’s Argument on This Point.

- (1) THE QUESTION IS PROPERLY BEFORE THIS COURT ON THE FIRST ASSIGNMENT OF ERROR AND THE EXCEPTION TO THE TRIAL COURT’S REFUSAL TO GRANT A DIRECTED VERDICT.

The bill of exceptions contains the following statement:

“All of the evidence having been received the cause was argued to the jury by the attorneys for the respective parties and in the course of the presentation of law to the court the defendant requested the court to give the following instruction to the jury:

“‘The jury is instructed to find for the defendant.’

“But the giving of the foregoing instruction the court refused, to which refusal the defendant excepted on the ground that the instruction should be given and under the evidence in (Bill of Exceptions x7, 109) the cause the defendant was not liable, the exception being then and there allowed by the court.”

The first assignment of error reads as follows:

“By the uncontradicted evidence in the cause Swayne & Hoyt, Inc., was the managing agent only of the steamship ‘Camino’, and the court erred in refusing to give the instructions to the jury requested by the defendant to return a verdict for the defendant.”

Defendant in error contends, at pages 1-4 of his brief, that the question of the insufficiency of the evidence to sustain the judgment against Swayne & Hoyt, Inc., upon the ground that Swayne & Hoyt, Inc., was shown to be merely managing agent of the owners of the “Camino”, was not raised by the foregoing exception and assignment. The ground of this contention is that the request for a directed verdict is not shown to have contained a statement of the ground upon which it was made. In other words, counsel contend that, conceding that there was no evidence in the record at the time the case went to the jury upon which the jury could have found Swayne & Hoyt, Inc. liable to Barsch,

nevertheless the district court cannot be held to have erred in declining plaintiff in error's request for a directed verdict, because plaintiff in error did not specify the precise ground in its request. We submit that this contention is not supported by the law or any rule of practice prevailing in the federal courts.

- (a) In the federal courts it is the duty of the trial judge to direct a verdict for the defendant, even if no motion is made, if the evidence would compel him to set aside a verdict for the plaintiff.

Burgie v. Hicks, 203 Fed. 340, 349:

“In the United States court it is the duty of the court to direct a verdict when the evidence is such that the court would set aside a verdict the other way, if rendered, as against the evidence.”

Shoup v. Marks, 128 Fed. 32, 37:

“The trial court may direct a verdict in any case where the evidence is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.”

In

Gibboney v. Board of Chosen Freeholders, 122 Fed. 46,

it appeared that the trial court had granted a directed verdict of its own motion. In upholding the trial court's ruling, Judge Acheson, speaking for the third circuit, said, at page 48:

“The assignment that the court erroneously directed the jury to find a verdict for the defendant, we think, is without valid basis. The plaintiff did not ask leave to take a voluntary nonsuit, nor did

the defendant move for compulsory nonsuit. The only course then left to the trial court was a direction for a verdict for the defendant.’

We submit at this point that if it is the duty of a district judge, or even if it is only within the power of a district judge, to direct a verdict of his own motion in a case where he would be compelled to set aside a contrary verdict, it cannot be necessary for the party making a motion for a directed verdict to embody in such motion the ground or grounds upon which it is based.

(b) It has been held that in the federal courts a request for an instruction “that the jury return a verdict in favor of defendant” is the equivalent in all respects to a motion for a directed verdict.

Detroit Crude Oil Co. v. Grable, 94 Fed. 73, 6th Circuit, 1899,

(quoting from the syllabus):

“A request for a charge that, under the evidence, the verdict must be for defendant, is equivalent to a motion to direct a verdict.”

The court said, speaking through Judge Clark:

“The court also denied the defendant’s motion at the close of the whole evidence to direct a verdict for the defendant, to which exception was duly taken; and, although the argument in this court has been directed mainly to the court’s action in that respect, yet, curiously enough, the court’s refusal to grant the motion is not specifically assigned for error. The court also refused the defendant’s first request, which was in this language: ‘Under the evidence in this case, the verdict of the jury must

be for the defendant'. This request must be regarded as in all respects equivalent to a motion to direct a verdict, for it could have no other purpose or meaning, and we accordingly so treat it."

Erie R. Co. v. Rooney, 186 Fed. 16, at p. 18,

Judge Knappen, speaking for the Sixth Circuit, in 1911, said:

"Plaintiff contends that the insufficiency of the evidence to support a verdict can only be raised by motion at the close of the testimony, as distinguished from a written request for an instructed verdict. There is no merit in this proposition. It is immaterial whether the request for directed verdict be made orally or in writing. The only requirement is that it be made at the close of all the testimony and before submission to the jury. The rules governing the action of the court on request for directed verdict are well understood."

The procedure followed in these two cases is precisely that which was followed in the case at bar. The plaintiff in error requested the court to instruct the jury to return a verdict for the defendant. As pointed out in these two authorities, this must be taken in all respects as the equivalent of a motion for a directed verdict.

(c) The only authority cited by defendant in error does not sustain his contention.

At page 4 of his brief, defendant in error cites *United Engineering and Contracting Co. v. Broadnax*, 136 Fed. 351, as sustaining the proposition that a motion for a directed verdict must contain a statement of the ground upon which it is based. In that case a motion to dismiss the complaint was made upon the ground "that there has been no evidence to establish the damages under the rule of law applicable to the facts in the

case''. The motion was denied, and in the higher court an attempt was made to raise an entirely different question based upon the denial of the motion. In other words, in that case the motion had been made upon a specific ground, and the court held in effect that it was thereby limited to that ground. This is made clear by the following excerpt from the opinion:

“It is contended that there was no sufficient proof upon which prospective profits could be estimated, ‘for the reason that the value of the stone in the ledge * * * was never proved’. This point was not reserved by any exception. Defendant seeks to raise it under denial of motion to dismiss the complaint; but the ground therein stated, ‘that there has been no evidence offered to establish damages under the rule of law applicable to the facts in the case’, called the attention of the court only to the proposition already discussed, viz., that defendant insisted that contract price should be compared, not with cost, but with market value.”

Another point of distinction lies in the fact that in the *Broadnax* case the motion was a motion to dismiss and was not a motion for a directed verdict.

In the present case the motion was in the form of a request that the court direct the jury to find for the defendant. It was in effect a demurrer to the evidence, and it challenged the sufficiency of the evidence to support a verdict in favor of the plaintiff. The evidence showed beyond dispute that Swayne & Hoyt, Inc., were managing agents for the owners of the “Camino”. If, as a matter of law, Swayne & Hoyt, Inc., could not be held liable to Barsch under the evidence, the trial judge would have been compelled to set aside any verdict

that could have been rendered against the defendant in favor of Barsch, and under the authorities it was the duty of the trial judge to grant the instruction.

(2) THE BILL OF EXCEPTIONS IS SUFFICIENT.

A still more technical objection is raised by defendant in error at page 5 of his brief.

The bill of exceptions contains the evidence and the trial court's instructions and the requests for instructions. Some of the evidence is given in narrative form, other portions of it in condensed form. The trial court's certificate reads as follows:

“And it is now certified by the undersigned United States District Judge for the District of Oregon, sitting at the trial of this action, that the foregoing bill of exceptions contains substantially all of the evidence offered and received at the trial, with the exception of the evidence as to the extent, nature, and character of the plaintiff's injuries and the damages sustained by him and upon these questions the evidence was conflicting.”

It is claimed that this court is precluded from examining the sufficiency of the evidence to support the judgment, because it appears from this certificate that all of the evidence has not been brought up.

- (a) The amount of damages to plaintiff not being in dispute, it was unnecessary to bring up the evidence bearing upon that point.

The certificate of the trial judge in effect says that substantially all of the evidence except that relating to

the amount of damages to the plaintiff is contained in the bill. To have included such evidence in the bill would have been useless. The jury found that the plaintiff was damaged in the sum of \$1400. The sufficiency of the evidence to support that finding is not attacked upon this writ of error. The only question raised upon this writ involving the sufficiency of the evidence to support the judgment is as to whether or not plaintiff in error, Swayne & Hoyt, Inc., can be held liable for those damages. It was, therefore, proper practice to bring up only such evidence as could have a bearing upon that subject. To have done otherwise would have been to ignore the repeated admonitions of the Supreme Court on this matter of practice.

In

Hickman v. Jones, 9 Wallace, 197, 19 L. Ed. 551, Mr. Justice Swayne condemned the practice of bringing up all the evidence in the following language:

“We have to complain in this case, as we do frequently, of the manner in which the bill of exceptions has been prepared. It contains all the evidence adduced on both sides, and the entire charge of the court. This is a direct violation of the rule of this court upon the subject. We have looked into the evidence and the charge only so far as was necessary to enable us fully to comprehend the points presented for our consideration—thus in effect reducing the bill to the dimensions which the rule prescribes. No good result can follow in any case from exceeding this standard. Our labors are unnecessarily increased, and the case intended to be presented is not unfrequently obscured and confused by the excess.”

(b) The certificate shows that substantially all the evidence involving the point presented to this court is in the bill.

The certificate says that substantially all the evidence except the evidence as to the amount of damages to plaintiff is included in the record. The certificate could not truly have said that all of the evidence was in the record for two reasons. In the first place, the record did not contain the evidence as to the amount of plaintiff's damages, and we have shown that such evidence was properly omitted from the bill. In the second place, it will be seen that while some of the testimony in the record was in the form of question and answer, other portions of the testimony was condensed—a practice uniformly approved and commended. This being the case, it is clear that all of the evidence having any substantial bearing upon the question which this court is called upon to decide is contained in the bill. That is all that the court wants in the bill.

(3) **THE PAYROLL. BARSCH SIGNED IT BEFORE AND AFTER THE ACCIDENT. HIS SIGNATURE TO IT ATTESTS THAT HE WAS EMPLOYED BY THE OWNERS OF THE "CAMINO" AND NOT BY SWAYNE & HOYT, INC.**

It was stated by counsel, upon the argument, that Barsch did not sign the pay roll until long after the injury. This statement is also made at page 8 of defendant in error's brief, counsel there saying:

“The evidence that plaintiff signed a pay roll *long after the injury* and employment, which indicated that he was being employed by the owners of

the boat (trans. p. 25), amounts to nothing. The common working man signs such documents without paying the least attention to their provisions.”

The signature of the pay roll by Barsch is of such great significance upon this appeal that we feel under the obligation of presenting all of the evidence upon that subject to the court herewith.

The testimony shows that the method which was pursued in paying off the stevedores was to have the pay roll made up at the dock and then forwarded to Kennedy's office. The stevedores were at liberty to call upon the following day and receive their pay upon signing the pay roll. As a matter of actual practice, it appears that they usually authorized the business agent of the Union to call, sign for them, and receive their money; consequently, a great number of pay rolls were shown signed by the names of the men, with “E. A. S.” after each name, signifying that E. A. Schneider, the business agent of the Longshoremen's Union, had called and collected the men's pay. Schneider himself testified to this practice.

“Q. You have signed this thing a great many different places, for different men?

A. Yes, sir; the boys tell me they are laible to be busy, going on the dock the next day, and they tell me ‘Ed, go and get my money.’

Q. This ‘E. A. S.’ is everywhere your name?

A. Yes, sir.

Q. So you are very familiar with the pay roll?

A. Yes, sir; I put my signature for every man's name I sign, so the office force or cashier knows.”
(Trans. p. 49.)

Schneider was shown to have signed for the witness Henry Wolff (Trans. p. 67). He was also shown to

have signed for the witness Ferguson (Trans. p. 74). Indeed, it is clear from the record that this form of pay roll had been in effect for a long time, and was thoroughly familiar to all of the stevedores engaged on Albers No. 3 Dock.

The statement that Barsch did not sign the pay roll until after the accident is, however, specifically refuted by the record. It is true that Barsch testified that he signed the pay roll for the particular voyage three weeks after the injury, and that he did not receive his pay for that particular voyage until ten weeks after the injury; also that he signed that particular pay roll, which was the pay roll for Voyage No. 12, under protest (Trans. pp. 100, 101). Another pay roll, however, was shown him, being the pay roll for Voyage No. 4, and he admitted that it was his own signature which appeared on that pay roll, and that he had signed his name thereon and received his pay. We quote at length testimony as to these two pay rolls:

“Q. So I will show you now, Mr. Barsch, a pay roll for Voyage No. 4, Camino.

Mr. GILTNER. I object to that as not in evidence here.

Mr. GUTHRIE. We are going to use it in a minute. Wait a minute.

The COURT. Let him see it.

Q. On which I show you, on the second page, signature, ‘G. Barsch’. I will ask if that is your signature?

A. Yes, that is my signature.

Q. And this purports to show you drew pay?

A. Yes.

Q. And you signed this in Mr. Kennedy’s office?

A. Yes, in Mr. Kennedy’s office.

Q. You would be able to know what that was when you were looking it over?

A. I don't look at anything. The clerk put this in front of me, and I signed it.

Q. No reason why couldn't read it if you wanted to, was there?

A. We was not asked to read that.

Q. That is true; but you do not sign your name on being asked, to anything?

A. They only said to me to sign this pay roll. 'You got so much money, sign this.' They put it in front of you, you sign your name, and they take it away.

Q. Do you make a practice of not reading what you sign?

A. The pay roll, as long as I see my money is correct.

Q. You don't care where you get it from. Whether it says the steamer Camino, or the steamer Navajo, you don't care?

A. If I am not working for them, it would be different.

Q. Then you didn't read this. Is that what I understand?

A. Yes, as much as—when we go in this office, Mr. Kennedy or his clerk says, 'This is the pay roll for the steamer Camino' or any other steamer, sign it.

Q. So you know you are signing for the pay roll of a steamer?

A. Yes, been working there.

Q. And the fact is, you were working for that steamer?

A. I was working there on the dock, helping the unloading that steamer Camino.

Q. The clerk, says, 'Here is a pay roll for the steamer?'

A. Yes.

Q. You sign your name, that is all. Is that right?

A. Yes, that is all.

Q. So you knew, from what the clerk told you, you were working for the steamer?

A. No, didn't say we were working for steamer. Was unloading for Swayne & Hoyt, as much as I understand.

Q. Did the clerk tell you you were working for Swayne & Hoyt?

A. It is their steamer.

Q. I don't think you are qualified to say, is their steamer.

Mr. GILTNER. The steamer didn't pay you.

Mr. GUTHRIE. I think the best evidence would be the pay roll.

The COURT. I suppose it is the same as in every office. They pass out the pay roll and say sign it, and they never look.

Mr. GUTHRIE. I offer this in evidence, No. 4. Marked 'Defendant's Exhibit B'.

Q. This is your signature on Exhibit A. This is your signature about the middle of the page on this one?

A. Is that the same one?

Q. No, this is another. This is No. 12.

A. Yes.

Q. Is this your signature, is all I want to know?

A. The signature is right, but the pay is not right.

Q. Well, I don't care about that. The only thing is whether this is your signature.

A. I didn't take the pay at all from that steamer.

Mr. GILTNER. What is that?

A. I didn't take the pay from that steamer until ten weeks after on that pay roll.

Mr. GILTNER. When did you sign that?

A. I signed under protest. It was put to me to sign that pay roll so they could forward to San Francisco. I signed it about three weeks afterwards, after it was made out; three weeks after the steamer left, I signed it under protest. I says, 'I don't know why I signed here for and how it is coming out.' I says, 'I am hurt and I don't know

how it will come out, whether I sign this or whether I got a right to sign this or not.' So I don't sign it, but the clerk told me, he says, 'This pay roll has got to go to San Francisco; got to go to Swayne & Hoyt in San Francisco, and we can't send it off'; and he says, 'You are the only one not signed.' So under that protest I signed it, but didn't take the money.

By Mr. GILTNER. Did you take the money?

A. No, I didn't.

Q. So when you protested then, you didn't even read it over to see what it was about?

A. The clerk told me it was the pay roll.''
(Trans. pp. 97-101.)

As to the contention that Barsch did not have a proper understanding of what he was signing, it is submitted that no foundation is laid in the record for the claim that Barsch should not be bound by his signature. No showing is made that anything was said or done which prevented Barsch from reading the paper. Under such circumstances, a person signing a receipt is bound by its contents.

We have set forth the contents of this receipt in our opening brief. We set it forth again at this point because we believe it absolutely establishes the fact that Barsch himself knew that he was being employed, not by Swayne & Hoyt, Inc., but by the owners of the "Camino". The form of the pay roll is described at pages 38 and 39 of the record as follows:

"The pay roll referred to was offered and received in evidence as the pay roll, containing the following at the head of the pay roll:

'Office of Swayne & Hoyt, San Francisco, California.

Received from Captain for account of above steamer and her owners.'

Then followed signatures of men engaged in the unloading and the name of the plaintiff Barsch was signed to the pay roll, each of the names signed on the pay roll indicating that each had received a given amount for work while unloading the vessel. On the pay roll were stamped the words 'Steamer Camino, Voyage No. 12'."

The evidence as to the pay roll may be summed up as follows:

(1) *The pay roll was on a form that had been in constant use for a long time. It had been signed by the members of Barsch's gang and their representative repeatedly.*

(2) *Barsch is shown to have personally signed it in receipting for pay on a previous voyage of the "Camino", Voyage No. 4.*

(3) *Barsch is shown to have signed it in receipting for his pay on Voyage No. 12 of the "Camino", the voyage during which he was injured. The fact that he signed three weeks after his injury, does not diminish the value of the pay roll as evidence of Barsch's knowledge that he was employed by the owners of the "Camino". The intention of parties to a contract may be gathered from their subsequent, as well as their prior or contemporaneous conduct. In fact the signature of Barsch to this receipt after the injury and the subsequent acceptance of pay thereafter, under it, amounts to a binding admission by Barsch that he was employed by the owners of the "Camino", and not by Swayne & Hoyt, Inc.*

(4) *There is absolutely no evidence in the record upon which the claim can be predicated that Barsch should be relieved from the effect of his receipt to the pay roll. He was given free opportunity to read the pay roll before he signed it. He was able to read and understand, and there was nothing ambiguous about the language of the receipt. There is not the slightest evidence that any advantage was taken of him in obtaining his signature, and if he did not read before signing, the fault is his own, and he cannot avoid the effect of his signature.*

(4) SWAYNE & HOYT, INC., WAS NOT AN UNDISCLOSED AGENT. EVERYONE IS SHOWN BY THE RECORD TO HAVE KNOWN THAT IT WAS THE "AGENT FOR THE OWNER". THE FACT THAT THE "CAMINO" WAS OWNED BY THE WESTERN STEAM NAVIGATION COMPANY WAS A MATTER OF PUBLIC RECORD.

Counsel have failed to distinguish the authorities cited in our opening brief to the effect that where an agent discloses that he is acting as an "agent for the owners of a vessel" such agent has made a sufficient disclosure to avoid the rule that an undisclosed agent is liable to persons dealing with him in the alleged belief that he is acting as a principal.

It only becomes necessary, therefore, to establish that, as a matter of fact, Swayne & Hoyt, Inc., made it known to Barsch that it was acting as the "agent for the owner" of the "Camino". It is submitted that this cannot be controverted. It is shown that Barsch actually signed a receipt which showed on its face that he

was in the employment of the owners of the "Camino". Kennedy testified that he believed himself to be merely a sub-agent for the owners, acting through Swayne & Hoyt, Inc.

Under the general rule stated in the authorities, this would be sufficient to determine plaintiff in error's position. It is to be noted further, however, that the fact that the Western Steam Navigation Company was the owner of the "Camino" was a matter of public record. No harm could come to Barsch, therefore, providing he knew that plaintiff in error was "agent for the owner" of the "Camino". Being possessed of such knowledge, he could have no difficulty in determining the exact identity of his employer. Counsel's intimation that Barsch was in a difficult position after he was injured, in determining whom he should sue, is thus answered. Barsch knew that Swayne & Hoyt, Inc., was acting as the agent for the owner of the "Camino". He also knew that he was being paid by the owners of the "Camino". He was chargeable with knowledge as a matter of law that the ownership of the "Camino" was a matter of public record, and he could have ascertained by inquiry at the Custom House that the Western Steam Navigation Company was such owner.

(5) THE ONLY AUTHORITY RELIED UPON BY COUNSEL IS NOT IN POINT.

Counsel refer to the case of

Tippecanoe Loan and Trust Co. v. Jester, 101
N. E. 915.

In that case it was held that the managing agent of a building could be held liable to a person injured through the negligent operation of an elevator in the building simply by reason of the fact that he was shown to have control of the elevator.

The case is clearly distinguishable from the case at bar. This is made clear by the following extract from the opinion:

“The real ground, as we see it, for the application, or non-application, of the rule, as to liability, is not one of agency, but a question of the duty imposed by general principles of law, upon the owner, or those in control of property for him, to so use or manage the property as not to injure the property of another, by its negligent use, or to injure the person of another who is where he has a right to be, or is in the use of property for which use he pays. That there is a privity in law, by virtue of which every one in charge of property is under obligation to so use it as not to injure another. It is a duty imposed by law, it is true, but privity arises from the obligation to those in a situation to insist upon its respect, and the neglect of performance must, in order to render the agent liable, be neglect of performance of a duty which he owes third persons, independent of and apart from the agency which arises from contract.”

Thus, in the case cited, the ground of liability was that the agent, by assuming actual control of a dangerous instrumentality, became liable to the public generally for any negligent operation of such instrumentality. In the present case, Barsch sued Swayne & Hoyt, Inc., upon the theory that the latter corporation was his employer and that, as such employer, it was under the obligation of furnishing him a safe place to work upon

the dock. Barsch further contended that, as his employer, Swayne & Hoyt, Inc., was under the obligation imposed by the Oregon Employer's Liability Act of 1911. The action is not, therefore, based upon a duty which Swayne & Hoyt, Inc., might have owed to the public generally, assuming that it had been shown to have been in control of the winch, but upon the duty which Swayne & Hoyt, Inc., was supposed to owe to Barsch as his employer.

There is, furthermore, no possible support in the record for the contention that Swayne & Hoyt, Inc., was in control of the winch. Even if it could be said that there was sufficient evidence to support such a finding, it could not be said that anything was done or left undone by Swayne & Hoyt, Inc., which could support a finding of negligence as between persons under no special duty toward one another. In other words, if no relationship of master and servant were shown, the Oregon Employer's Liability Act could not possibly apply, and the operator of the winch would not be under a statutory or other obligation to furnish a system of signals nor would the operator of the winch be under an obligation to Barsch, or to any one else, to make the place surrounding the winch a safe one.

For these reasons, the doctrine of the Tippecanoe case is clearly inapplicable.

(6) THE CLAIM THAT SWAYNE & HOYT, INC., ADMITTED LIABILITY IS GROUNDLESS.

It is argued by counsel with some show of earnestness that the negotiations which are stated by Barsch

to have taken place in San Francisco between himself and Mr. Moran of Swayne & Hoyt, Inc., show an admission of liability upon the part of the latter company. Barsch's testimony upon this point is set forth at pages 78 to 82, inclusive, of the record. In substance, what appears to have taken place was, that Barsch called upon Mr. Moran and the latter referred him to Mr. Campbell, the attorney for the company. Nothing ever came of the proposed compromise.

Under ordinary circumstances it is hard to conceive how the mere discussion of a proposed compromise can be taken to be an admission of a liability. Counsel have not pointed out any particular portion of the record which is relied upon to furnish such an alleged admission. We invite the attention of the court to the portion of the record above referred to (Trans. pp. 78-82).

In the case at bar there is nothing to show that the negotiations of Swayne & Hoyt, Inc., with Barsch, even if they can be deemed in the light of an admission, were upon any different basis than those which had previously taken place; in other words, Swayne & Hoyt, Inc., acted throughout the entire transaction as the agent for the owners, namely, the Western Steam Navigation Company.

The character and effect of the negotiations under discussion are clearly pointed out by the trial judge in the following portion of his instructions (Trans. p. 162):

“Again there has been some testimony about an interview between Mr. Barsch and Mr. Moran, and

Swain & Hoyt in San Francisco, and an examination that was made of him by a physician, at the request or direction of Swain & Hoyt, and that Mr. Kennedy, the local man here in Portland, whom plaintiff claims to be the agent of Swain & Hoyt, reported this accident to Swain & Hoyt. Now, that may be consistent with liability on the part of Swain & Hoyt, but not inconsistent with non-liability, because if they were the managing agents representing the owners, the natural person to whom any one having a claim against the owners of the vessel would go would be to the managing agent, and that is Swain & Hoyt; the natural person to whom Kennedy would make his report would be the managing agent, the man who represented the vessel, and so that fact alone would not justify a recovery in this case'' (Trans. pp. 162, 163).

The Second Branch of the Case—The Trial Court Erred in Applying the Employers' Liability Act of Oregon of 1911.—Reply to Defendant in Error's Argument Upon This Point.

(1) THE QUESTION IS PROPERLY BEFORE THIS COURT ON THE FOURTH ASSIGNMENT OF ERROR AND THE DEFENDANT'S EXCEPTION TO THE TRIAL COURT'S REFUSAL TO INSTRUCT THAT THE OREGON ACT DID NOT APPLY.

Defendant in error raises the technical objection to the consideration of this question by this court upon the ground that plaintiff did not except to the portions of the charge of the court which in effect told the jury that the Employers' Liability Act of Oregon governed the case.

Plaintiff in error did not except to such portions of the charge, it is true, but its reason for not doing so

was that it had already requested the court affirmatively to charge the jury *that the Act did not apply*, and to the refusal of the court to give this requested instruction plaintiff in error excepted (Trans. p. 157). The bill of exceptions recites that "the ground of the exception being that the Employers' Liability Law of the State of Oregon had no application to the loading or unloading of vessels coming in and out of the City of Portland and engaged in interstate commerce * * *". We think there can be no doubt that the question is before the court upon the record.

(2) THERE IS UNCONTRADICTED EVIDENCE IN THE RECORD THAT THE "CAMINO" WAS ENGAGED IN INTERSTATE COMMERCE.

We accept counsel's challenge contained at page 40 of defendant in error's brief, with respect to the assertion that the "Camino" was engaged in interstate commerce.

The fact that the steamers on the Arrow Line were engaged in interstate commerce was and is so thoroughly well known that we did not anticipate the question would be raised. For that reason in our opening brief we stated it to be conceded. In at least two portions of the record testimony was elicited by counsel for the defendant in error himself that the "Camino" was engaged in interstate commerce. We quote those portions of the record:

"Q. By Mr. GILTNER. There is one question may I ask before he goes by, so as to give them a chance to cross-examine. Did Swayne & Hoyt have any cargo or freight on that boat, the steamer Camino, on the 31st day of March, 1913?"

“A. *There was cargo aboard that ship under their directions, that they had secured at San Francisco, and sent up here that the ship was handling.*” (Testimony of C. D. Kennedy, Trans. p. 26.)

* * * * *

“Q. Do you know if there was any cargo being taken out of the hold of the vessel at that time that was shipped as Swayne & Hoyt’s goods?

“A. Not as Swayne & Hoyt’s goods. Once in awhile you would find a case would be marked ‘Care of Arrow Line’, or ‘Shipped via Arrow Line’.

“Q. That would be some goods that were transshipped would it; having been started by another route, and then carried subsequently by the Arrow Line?

“A. *Either that way or routed in San Francisco. For instance, if I would ship goods to you from San Francisco, to Portland, I would mark the goods ‘Care Arrow Line’.*” (Testimony of A. R. Williams, Trans. pp. 117, 118.)

It is unnecessary to argue that a vessel which is shown to carry freight from the port of San Francisco to the port of Portland is engaged in interstate commerce.

(3) BARSCH COULD NOT HAVE RECOVERED WITHOUT SHOWING THAT AT THE TIME HE WAS INJURED THE PLAINTIFF IN ERROR OWED HIM A DUTY ARISING OUT OF HIS EMPLOYMENT. THE CONTRACT OF EMPLOYMENT, IF THERE WAS ANY, WAS A MARITIME CONTRACT. CONSEQUENTLY THE MARITIME LAW SHOULD HAVE BEEN APPLIED NOTWITHSTANDING THAT THE TORT TOOK PLACE ON LAND.

Counsel for the defendant in error concede that Barsch’s contract of employment, if there was one, was

a maritime contract. We in turn concede that the injury took place on land, and that the tort was what was commonly known as a non-maritime tort.

We earnestly submit that the fact that the tort involved in this case took place upon land is not determinative of the question as to whether or not the maritime law should be applied. To so hold is to prefer the form to the substance—to apply the rule without the reason.

Had Barsch been a mere stranger, licensee or trespasser upon the dock at the time of the injury, he could not have recovered. There would have been no negligence. There would have been no violation of any duty which Swayne & Hoyt, Inc., or which any one, owed to him. Consequently, when Barsch came to prove his case, it became necessary for him to show that a greater duty was owed to him by Swayne & Hoyt than Swayne & Hoyt would have owed him had he merely been a licensee or trespasser. It thereupon became necessary for Barsch to introduce his contract of employment.

The contract of employment was introduced, or at least that which is claimed to have been evidence of such a contract, was introduced. Barsch's recovery was upon certain duties arising out of that alleged contract. Without the existence of such a contract Swayne & Hoyt, Inc., would not, under the Oregon statute, have been under the duty to Barsch to see that a safe system of communication was established between the men in charge of the winch and Barsch and his fellow employees. Without the existence of such a con-

tract Swayne & Hoyt, Inc., would not have owed Barsch the duty of furnishing him a safe place to work. Without the establishment of such a contract Barsch would have been thrown out of court without the judgment which he now holds, or any judgment.

It seems to be reduced to an absolute certainty that without the existence of this alleged maritime contract this judgment which Barsch has obtained could never have come into existence; and we submit that whatever name may be given to the injury to Barsch or to the tort which occurred upon the dock in Portland, the substantial rights which Barsch has sought to enforce, and has enforced in this action, arise out of, and are dependent for their very existence upon a maritime contract. This being so, it violates the spirit of the rule that makes the maritime law the exclusive basis of maritime rights to apply a state statute in this case.

This reasoning has found recognition in the courts.

In the case of

Schuede v. Zenith S. S. Co., 216 Fed. 566,

discussed *in extenso* in our opening brief, Judge Killits said:

“As we look at it, the provisions of the law maritime as to the relation of a seaman to his employment are part of the substance and obligations thereof, which cannot be modified by state law, even through recourse to the saving clause of the Code. * * *

“In the case of a cause of action for an injury incurred in the course of a maritime employment, to avoid the manifest inconveniences and inequalities involved in plaintiff's interpretation of the saving clause in question, it is not only reasonable.

but well within the language of the law, to require whichever court, state or federal, is entered to work out a remedy, to enforce the general and uniform law maritime under which the contract of employment was made.”

Again, it was said by Judge Ward, speaking for the judges of the second circuit, in

Cornell Steamboat Co. v. Fallon, 179 Fed. 293,

“The contract between the defendant and the deceased is a maritime contract, and establishes their relation as well in courts of law as in courts of admiralty.”

Certain it is that if the maritime law is to be applied to the exclusion of state legislation at all, it should be applied in those cases generally where it can be shown that the right sought to be enforced is wholly non-existent except for a contract conceded to be of a maritime character.

(4) THERE CAN BE NO DOUBT BUT THAT THE OREGON ACT OF 1911, AND PARTICULARLY THAT FEATURE OF IT WHICH THE TRIAL COURT APPLIED IN THE PRESENT CASE, CONSTITUTES AN INTERFERENCE WITH INTER-STATE COMMERCE WITHIN THE PROHIBITION OF THE COVINGTON CASE.

Counsel's argument upon this branch of the case is in effect that the provisions of the Oregon Employers' Liability Act of 1911 are severable; that conceding that some of those provisions imposing safety appliance regulations would amount to an undue interference with interstate commerce, nevertheless the sole

provision which the court applied in the present case did not constitute such interference.

The particular provision of the Liability Act which the trial court applied in instructing the jury in the present case was as follows:

“* * * all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power.”

This provision, when applied to vessels engaged in interstate commerce, imposes the following burdens upon owners of vessels engaged in interstate commerce: (1) It requires the installment of signal apparatus wherever machinery other than that operated by hand-power is found upon the vessel; (2) notwithstanding that there may be other protective measures equally efficient to accomplish the safety of the employees and the general public with respect to such machinery, the owners are required to install signal apparatus; (3) owners are subjected to fine and imprisonment if this provision of the statute be not observed.

Counsel contend that this statute does not impose a burden upon interstate commerce, because no particular kind of signals are required. In other words, it is argued that the statute will not lead to difficulty, because the owner of the vessel is only required to have a system of signals, and not any specified system, and

that, therefore, the difficulty will not be met of having Oregon require one particular system and an adjoining state a different one.

The fallacy of this argument is apparent. The statute imposes a direct obligation upon the owners of installing "a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power". Signals there must be, and the sufficiency and character of such signals are left to be determined or passed upon by a judge or jury of the particular state enacting the statute. Thus, the owner is not in any sense helped by this apparent looseness in determining the precise character of signals. In the Covington case it was held that the State of Kentucky could not fix the number of passengers to be carried on a street car engaged in interstate commerce. It was pointed out that such an ordinance might and probably would bring the street car company into conflict with regulations adopted by an Ohio municipality into which the car line extended.

The proposed regulation in the present case is subject to the same criticism. The regulation requires, first, protection of machinery by means of signals; secondly, it in effect requires that the sufficiency of such signals shall be determined by an Oregon judge or an Oregon jury. This regulation may, upon the same reasoning employed by Justice Day in the Covington case, bring the owners of vessels engaged in interstate commerce into conflict with the ideas embodied in similar legislation in another state, where protection by means of

some other system than that of signals may be preferred, or where the ideas of judges or juries as to the sufficiency of such system of signals may conflict with those which may be adopted by judges or juries in the State of Oregon.

Let us suppose, for instance, that under judicial interpretation by the courts of Oregon, it becomes settled that this provision of the Act is not complied with by the installation of a certain type of signals. Provided that the principle is established that state action may extend to this sort of regulation, there is nothing to prevent the State of California, or any other state, from compelling the owners to install the very system condemned by Oregon.

Let it be further remembered that the field of action in which the state interference with commerce is sought to be upheld in this case is upon a higher plane than that involved in the Covington case. Uniformity is necessary in many matters affecting interstate commerce on land, but the necessity for uniformity in matters of maritime commerce has found expression in the world-wide adoption of a common system of jurisprudence—the maritime law.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
April 3, 1915.

IRA A. CAMPBELL,
SNOW & McCAMANT,
Attorneys for Plaintiff in Error.

No. 2510

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWAYNE & HOYT, INC. (a corporation),
Plaintiff in Error,

vs.

GUSTAV BARSCH,
Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

IPA A. CAMPBELL,
Merchants Exchange Building, San Francisco,

SNOW & McCAMANT,
Portland, Oregon,
*Attorneys for Plaintiff in Error
and Petitioner.*

Filed this day of September, 1915.

FRANK D. MONCKTON, *Clerk.*

By *Deputy Clerk.*

No. 2510

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWAYNE & HOYT, INC. (a corporation),	}
<i>Plaintiff in Error,</i>	
vs.	
GUSTAV BARSCH,	}
<i>Defendant in Error.</i>	

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The plaintiff in error, Swayne & Hoyt, Inc., respectfully asks a rehearing in this case particularly that further consideration may be given to a single point, dealt with for the first time in the majority opinion.

The majority opinion concludes as follows:

“The ground of jurisdiction in the court below was diversity of citizenship. The citizenship of the defendant is properly alleged in the complaint, but the plaintiff neglected to allege his own citizenship. Under the Act of Congress approved March 3, 1915, which permits an amendment in the appellate court in such a case so as to show on the record diverse citizenship and jurisdiction, the plaintiff will be

permitted to file, within ten days, such an amendment, and inasmuch as the question of the defect in the pleadings has not been raised by the parties, this order is made without costs to the plaintiff.”

On or about the 16th of August, 1915, the defendant in error filed in this court an amended complaint, pursuant to the above quoted portion of the majority opinion, and subsequently on August 23, 1915, an order was made affirming the judgment.

The amended complaint was in all respects the same as the original complaint which appears in the record, with the exception that the following paragraph is inserted:

“That the plaintiff now is and was during all the times herein mentioned a resident and citizen of the State of Oregon.”

Thus, for the first time, at the very conclusion of the case, an allegation is made by plaintiff that he “now is and was during all the times herein mentioned a resident and citizen of the State of Oregon”. Upon this bare allegation, which plaintiff in error has not yet had an opportunity even to deny—much less to disprove, and with respect to which defendant in error has not yet even been called upon to produce evidence, the judgment is affirmed. In other words, it is admitted that the residence and citizenship of the defendant in error in the State of Oregon are jurisdictional facts without which the judgment of the district court could not stand. These facts were of course issuable, and upon them plaintiff in error was entitled to its day in court. It is respectfully submitted that plaintiff in error

has not had its day in court upon these issues, and that if the judgment is allowed to stand upon the bare allegation of residence and citizenship contained in the amended complaint of defendant in error, it is thereby deprived of its property without due process of law in violation of the fifth amendment to the Constitution of the United States.

Such a result does not find justification in section 274c of the Judicial Code contained in the amendatory act of March 3, 1915. That section reads as follows:

“Sec. 274c. That where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though *defectively alleged*, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly *pleaded* at the inception of the suit, or, if it be a removed case, in the petition for removal.”

It is submitted that this section has no applicability whatsoever to the case at bar. The section allows an amendment to be made in the Circuit Court of Appeals in cases where

“the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though *defectively alleged* * * *.”

It then provides that upon the amendment the suit shall be proceeded with

“the same as though the diverse citizenship had been fully and correctly *pleaded* at the inception of the suit”.

It is apparent that this section was intended to remove a defect *in the pleadings* and not a defect *in the record*. The language is, “though defectively *alleged*”, and, “the same as though the diverse citizenship had been fully and correctly *pleaded*”. In other words, the section aims to cover a case *where the diversity of citizenship appears in the record, but is defectively alleged*.

The evil which existed before this amendment was sufficient to justify the amendment. In cases where the record fully showed before the appellate court that “diversity of citizenship in fact existed”, but where such diversity of citizenship was not properly alleged in the pleadings, it was necessary for purely technical reasons to send the case back for a retrial. The amendment is aimed at this cumbersome and useless procedure and fully cures the vice of it.

It is obvious that the amendment could not have the effect which the court has given it in this case. The court has construed the section to mean that wherever as a matter of fact diversity of citizenship exists (even though such diversity of citizenship did not appear from the bill of exceptions or any other portion of the record), the pleadings may be amended to show diversity of citizenship. In cases like the present, diversity of citizenship is a jurisdictional fact. It is unbelievable, therefore, that such fact may be established merely by

pleading it. Such fact must not only be pleaded, it must be proved. The construction which the court has given to the amendment admits the recovery of a judgment on the bare pleading of a jurisdictional fact.

We submit, first, that there is no possible construction for this amendment, except that it applies only to cases where it affirmatively appears in the record that diversity of citizenship existed. But, assuming that we are wrong in this contention, we believe that counsel for defendant in error will admit that there must be some showing in support of his allegation of diversity of citizenship. The court must at least order a reference to determine whether or not the defendant in error's allegation of his residence and citizenship in Oregon in fact exists. The amendment does not confer upon the court any jurisdiction to try this issue, nor do we know of any machinery which the court possesses to try it. However, unless some such proceeding is possible, we respectfully submit that the judgment must be reversed and the case remanded to the trial court with instructions that it try out this issue. In this connection it should be borne in mind that upon a writ of error from a judgment in an action at law, the jurisdiction of this court is limited exclusively to questions of law, and it has never been suggested that in such a case the Circuit Court of Appeals could deal in any way with a question of fact.

The situation in which the plaintiff in error is left by the judgment of affirmance in this case is a singular one. It has no knowledge whatsoever of the truth or untruth of the bare allegations in the amended com-

plaint as to Barsch's residence and citizenship in the State of Oregon. Unless said allegation is true, the District Court did not possess jurisdiction, and its judgment against plaintiff in error is void. Plaintiff in error was surely entitled to a day in court upon this issue, and was entitled not only to produce such evidence as it could to negative such allegation, but to cross-examine Barsch himself as to it. It is respectfully submitted that every right which plaintiff in error possessed in the premises is denied to it by reason of the construction which this court has seen fit to place upon the amendment referred to.

Dated, San Francisco,
September 4, 1915.

Respectfully submitted,

IRA A. CAMPBELL,
SNOW & McCAMANT,
*Attorneys for Plaintiff in Error
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

IRA A. CAMPBELL,
*Of Counsel for Plaintiff in Error
and Petitioner.*

No. 2510

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

SWAYNE & HOYT, INC. (a corporation),
Plaintiff in Error,

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GUSTAV BARSCH,
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**SUPPLEMENT TO PETITION OF PLAINTIFF IN ERROR
FOR A REHEARING.**

IRA A. CAMPBELL,
SNOW & McCAMANT,
*Attorneys for Plaintiff in Error
and Petitioner.*

Filed this.....**Filed**.....day of September, 1915.

SEP 24 1915
FRANK D. MONCKTON, Clerk.

By.....**F. D. Monckton,**.....Deputy Clerk.

No. 2510

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWAYNE & HOYT, INC. (a corporation),
Plaintiff in Error,

vs.

GUSTAV BARSCH,
Defendant in Error.

SUPPLEMENT TO PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

Since filing the petition for a rehearing in this case, our attention has been called to the report submitted by Representative Dupré, accompanying House Resolution No. 4545, in which the Committee on the Judiciary advised the passage of the Act of March 3, 1915.

This report shows conclusively that the third section of the Act of March 3, 1915 (that is to say, that part adding Section 274c to the Judicial Code), was intended solely to afford an opportunity to supply *deficiencies in pleadings*.

That portion of the report which refers to the third section of the bill reads as follows:

“The third section of the bill was drawn to meet a difficulty which sometimes arises in practice and has caused grievous injustice. The plaintiff brings his suit and fails to allege in his pleading all the necessary jurisdictional facts. It has been held that it is necessary that the jurisdiction of the court should appear on the face of the pleadings, and actions have been dismissed after testimony has been taken and hearing has been had because of the failure to insert the proper allegations of citizenship. Indeed there are instances in which the defendant has not made the objection until after judgment and has then sued out a writ of error and succeeded in reversing the judgment, solely because of the failure of the pleading filed by the plaintiff to make the proper allegations of citizenship.”

It is well settled that reports of House Committees may be looked at for the purpose of ascertaining the meaning of a statute.

Church of Holy Trinity v. U. S., 143 U. S. 457,
464; 36 L. Ed. 226, 229;
Binns v. U. S., 194 U. S. 486; 48 L. Ed. 1087;
W. A. Gaines v. Turner-Looker Co., 204 Fed.
558.

We respectfully submit that a rehearing should be granted.

Dated, San Francisco,
September 27, 1915.

Respectfully submitted,

IRA A. CAMPBELL,
SNOW & McCAMANT,
*Attorneys for Plaintiff in Error
and Petitioner.*

